Supreme Court, U.S.
FILED

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No. (1) 09-252 AUG 26 2009

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In The

Supreme Court of the United States

JOHN GERARD QUINN,

Petitioner,

v.

JOHN ROACH, GAIL LEYKO, MANUEL GONZALES, CURTIS HOWARD, KRISTI TYLER, MICHELLE VOIRON, JOSE QUILES, COLLIN COUNTY, TEXAS, and the CITY OF McKINNEY, TEXAS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

John Quinn was arrested for aggravated sexual assault of a child involving his minor daughter, Katie Quinn. It is undisputed that the only evidence the police had in their possession before applying for the arrest warrant was the uncorroborated outcry of Katie, made on the day she was arrested for shoplifting and while attempting suicide, eight years after the alleged assault supposedly occurred. Mr. Quinn was never indicted and the charges were dismissed.

Quinn sued the arresting officer and the City of McKinney, Texas under 42 U.S.C. §1983 for violation of his civil rights under the Fourth Amendment for arresting him without probable cause. The lower courts dismissed Quinn's claims based on qualified immunity.

1. Did the lower courts err by granting qualified immunity to Officer Quiles *not* based on the analysis required by this Court, but by invoking a Fifth-Circuit-only process whereby they ignored the state of the law and instead answered fact questions concerning the conduct of the defendant as a "subpart" of the qualified immunity analysis?

After he was arrested, Quinn spent almost 17 months on bond even though an on-point Texas statute, modeled on the invitation found in *Barker v.*

QUESTIONS PRESENTED – Continued

Wingo, 407 U.S. 514 (1972), required the Prosecutors to either dismiss the charges or bring the case to the grand jury within nine months of the arrest. Quinn sued the Prosecutors and Collin County, Texas under §1983 for violation of his rights to "speedy trial" under the Sixth Amendment, and for violating his due process rights under the Fifth and Fourteenth Amendments. The lower courts dismissed these claims based on prosecutorial, qualified, and Eleventh Amendment/sovereign immunity.

2. Is a prosecutor entitled to prosecutorial immunity when he has not overcome the presumption that no such immunity exists, when he has not shown that his functions were entitled to immunity in 1871, when the subject conduct did not involve "advocacy," and when he has not shown that current public policy supports the continued application of such immunity to those functions?

3. Is a prosecutor entitled to any form of immunity from §1983 claims when he violates an administrative statute expressly designed to ensure the "speedy trial" rights of criminal defendants under the Sixth Amendment?

4. Is any defendant entitled to sovereign immunity under any circumstances when he is sued in his individual capacity?

QUESTIONS PRESENTED – Continued

Finally, the Fifth Circuit held that a §1983 plaintiff may not recover money damages for violation of the Sixth Amendment. This issue presents a question of first impression:

5. May a §1983 plaintiff recover money damages for violation of his Sixth Amendment right to a speedy trial if he can prove such damages were proximately caused by the violation?

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

John Quinn petitions this Honorable Court for a writ of certiorari to review and correct the decision of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Fifth Circuit dated May 4, 2009, is set forth in the Appendix at App. 1-29. The order of the Fifth Circuit denying *en banc* review is set forth at App. 44-45. The judgment is set forth at App. 42-43.[1] The opinion of the United States District Court for the Eastern District of Texas dated March 23, 2007 is set forth at App. 30-41. The opinion of the United States District Court dated March 31, 2008, is set forth at S. App. 1.

BASIS FOR JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its panel opinion on May 4, 2009, and

[1] The Fifth Circuit did not issue a separate document called a "judgment" in this case. App. 42-43 constitutes the judgment according to the Fifth Circuit's clerk.

denied a petition for rehearing *en banc* on June 3, 2009.[2] This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The text of the relevant Constitutional Amendments and statutory provisions are set forth at App. 46-49.

STATEMENT OF THE CASE

Introduction.

In every circuit except the Fifth, when qualified immunity is raised as a defense, the court answers two legal questions to make its ruling. The first question is similar to the standard under FRCP 12(b)(6) and asks whether the plaintiff has pleaded sufficiently to support a cause of action for violation of his constitutional rights. The second question asks whether the state of the law on the date of the conduct in question was such that officials of reasonable competence should have known the conduct under review was unconstitutional.

[2] Under Supreme Court Rule 13.3, the Fifth Circuit treats petitions for rehearing *en banc* as petitions for panel rehearing. Local Rule 35 for the Fifth Circuit, I.O.P.

This second inquiry does *not* ask whether the defendant's conduct itself was unreasonable or illegal so as to support a liability finding. Rather, it asks whether the law was clear enough to have given "fair warning" that the conduct alleged by the plaintiff was unconstitutional such that defendants of reasonable competence would have known it was improper.

The Fifth Circuit also is in conflict with this Court and the other circuits on the issue of prosecutorial immunity. The Court has formulated presumptions that must be overcome in order to obtain such immunity, and has held that in all but the rarest cases prosecutorial immunity should be denied because qualified immunity is sufficient to protect prosecutors from liability in those situations where they deserve protection.

Both of these immunity issues were decided wrongly by the Fifth Circuit because the court got the wrong result and because the court employed the wrong analyses in coming to its conclusions and, in the process, disregarded the settled precedents of this Court and placed itself in conflict with the decisions of every other circuit.

Factual History.

Petitioner was arrested on September 9, 2004 on charges that he sexually assaulted his own daughter back in 1996. The police officer who swore out the arrest warrant, Officer Quiles, admitted in his deposition that the only information supporting his

decision to arrest Quinn was the uncorroborated, eight-year-old outcry of Quinn's then-sixteen year old daughter, Katie Quinn, a witness of unknown reliability whose outcry was made on the same day she was arrested for shoplifting and while she was so distraught (or so intent on deflecting attention away from her arrest) that she was supposedly attempting to kill herself.

Following his arrest, Quinn was forced to remain on bond for 17 months because the Prosecutors would not dismiss the charges or bring them to a grand jury even though an on-point statute admittedly compelled this action. Based on the absence of probable cause to believe a crime had been committed, Quinn was eventually "no billed" by the grand jury.

Procedural History.

Quinn filed suit against Officer Quiles and the Collin County Prosecutors under 42 U.S.C. §1983 and brought state-law claims for malicious prosecution, false arrest/detention, negligence, negligence per se, gross negligence, and intentional infliction of severe mental anguish. He also sought injunctive relief.

The Prosecutors filed a FRCP 12(b)(6) motion to dismiss, and Officer Quiles filed a FRCP 56 motion for summary judgment. The gravamen of the dismissal and summary judgment motions was that the claims were all supposedly barred by various forms of immunity. The District Court dismissed all claims against the Prosecutors based on prosecutorial

immunity, qualified immunity, and Eleventh Amendment/sovereign immunity. The District Court dismissed the claims against Officer Quiles based on qualified immunity and state-law official immunity.

Quinn appealed. A three-judge panel of the Fifth Circuit Court of Appeals affirmed the rulings of the District Court, and *en banc* review was denied. This Petition followed.

The basis for federal jurisdiction in the court of first instance was 28 U.S.C. §1331 (federal question), 28 U.S.C. §1367 (supplemental jurisdiction), and 42 U.S.C. §1983 (civil rights violations).

REASONS FOR GRANTING THE WRIT

The Fifth Circuit failed to follow this Court's settled rules related to qualified immunity. Instead, it applied its own unique methodology wherein it decided whether the defendant's conduct was, in the court's view, factually "reasonable" rather than by deciding only whether the state of the law was or was not clear enough to provide the defendant with fair warning that his alleged conduct was unconstitutional.

The ruling below is in direct conflict with every qualified immunity decision ever made by this Court and with the decisions of every other circuit court of appeals that has addressed the same issues. Not only does that ruling confuse the law, but it leaves future

courts with a decision they could "follow" potentially leading to even more erroneous decisions on this important Constitutional issue. The Fifth Circuit's decision conflicts with the following cases:

Hale v. Fish, 899 F.2d 390 (5th Cir. 1990) (making an arrest based only on an uncorroborated story from an informant of unknown reliability is unconstitutional; creating an inter-circuit conflict)

Harlow v. Fitzgerald, 457 U.S. 800 (1982) (qualified immunity only afforded if the law was unclear that the alleged conduct was unconstitutional)

Hope v. Pelzer, 536 U.S. 730 (2002) (court engages in a two-step inquiry when determining qualified immunity, neither of which involve determining any questions of fact)

Malley v. Briggs, 475 U.S. 335 (1986) (qualified immunity only afforded if the law was unclear at the time of the defendant's conduct)

Ripson v. Alles, 21 F.3d 805 (8th Cir. 1994) (the uncorroborated outcry of an informant of unknown reliability in a child sexual assault case is insufficient to support probable cause under the Fourth Amendment and an arrest made under these circumstances triggers §1983 liability; no qualified immunity available to the defendant)

Saucier v. Katz, 533 U.S. 194 (2001) (qualified immunity requires a two-step process similar to Rule 12(b)(6) coupled with fair warning)

The Fifth Circuit also violated this Court's precedents related to prosecutorial immunity and thereby placed itself in conflict with every other circuit court. Specifically, the Fifth Circuit ignored the presumption that prosecutorial immunity does not exist, it did not make the defendants overcome this Court's "no immunity" presumptions, and it granted immunity for purely administrative conduct not involving advocacy. It also improperly granted sovereign immunity to persons sued in their individual capacity. The Fifth Circuit's decision conflicts with the following cases:

Alden v. Maine, 527 U.S. 706 (1999) (cities and counties and their employees do not enjoy sovereign immunity, and even state employees do not enjoy sovereign immunity when sued in their individual capacities)

Buckley v. Fitzsimmons, 509 U.S. 259 (1993) (absolute immunity is presumed not to exist unless there is a historical basis for its existence related to the particular function; burden on defendant to overcome presumption)

Burns v. Reed, 500 U.S. 478 (1991) (only functions relating to "advocacy" qualify for prosecutorial immunity)

Gagan v. Norton, 35 F.3d 1473 (10th Cir. 1994) ("advocacy," not the office of the defendant, is the linchpin for prosecutorial immunity)

Houston v. Partee, 978 F.2d 362 (7th Cir. 1992) (presumption is that no prosecutorial immunity exists

until an indictment issues; burden on defendant to overcome presumption)

Kalina v. Fletcher, 522 U.S. 118 (1997) (no prosecutorial immunity for actions not involving advocacy)

United States v. Marion, 404 U.S. 307 (1971) (invocation of speedy trial rights does not require that an indictment issue, only that charges be pending from an arrest)

Finally, the issue of whether a plaintiff may recover money damages for violation of his rights to speedy trial under the Sixth Amendment has never been decided by this Court, but is an important question of Constitutional law that needs to be addressed.

I. The Fifth Circuit's ruling is in conflict with the other circuits and settled Supreme Court authority relating to qualified immunity because it engaged in an improper determination of factual issues on summary judgment instead of restricting its review to only questions of law as required by *Saucier v. Katz* and standard summary judgment practice.

A. General rules. Civil rights defendants are entitled to qualified immunity only if the conduct they are alleged to have undertaken did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). That

is, if from prior case law it would be clear to all reasonably competent officials that the alleged conduct was unlawful in the situation the defendant confronted, then qualified immunity may not be granted because the defendant had "fair warning" that such conduct was unconstitutional.

The proper method for analyzing a claim of qualified immunity was succinctly presented in *Saucier v. Katz*, 533 U.S. 194 (2001) and again in *Hope v. Pelzer*, 536 U.S. 730 (2002). The court is required to answer two questions – and only two questions – in a qualified immunity case, neither of which involve making any fact determinations or deciding reasonableness of conduct:

Prong 1. Does the plaintiff's complaint properly allege violation of a Constitutional right?[3]

Prong 2. Was the law, at the time of the official's conduct, clearly established enough to give the defendant "fair warning" that the conduct he is accused of taking violated Plaintiff's Constitutional rights?

Saucier, 533 U.S. at 201-03; *Hope*, 536 U.S. at 739-40. If these two questions are answered in the affirmative, then qualified immunity is not available to the defendant.[4] These two inquiries involve only

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[3] This is the same question addressed in a motion to dismiss under FRCP 12(b)(6).

[4] The *Saucier* analysis is the express statement of the two-prong inquiry first articulated in Justice Brennan's concurrence in *Harlow*, 457 U.S. at 820-21.

questions of law, not questions of fact, which is the only reason they may properly be decided in the context of a FRCP 12(b)(6) motion to dismiss or a FRCP 56 summary judgment proceeding.

B. The errors made by the Fifth Circuit are readily apparent. This Court's recent efforts to clarify the qualified immunity decision-making process have seemingly fallen on deaf ears in the Fifth Circuit. This is shown by the fact that the Fifth Circuit, as a matter of practice, completely ignores the proper methodology found in this Court's case law. Describing the unique and erroneous methodology it uses to determine qualified immunity, the Fifth Circuit said:

> *This circuit* has at times characterized its approach in qualified immunity cases as a three-pronged inquiry in which the traditional second prong is divided into two separate and distinct inquiries: whether the right was clearly established *and whether an officer's conduct was objectively reasonable.*

App. 10, n.2 (emphasis added). In other words, instead of only answering the two relevant questions of *law*, the Fifth Circuit believes it is allowed to answer a third question of *fact*, which it denominated a "sub-part" of prong two, call it "prong 2B":

Prong 2B: Was the defendant's *conduct* "objectively reasonable"?[5]

The Fifth Circuit erroneously believes if its prong 2B is answered in the affirmative, qualified immunity is proper.

Attempting to support its analysis, the court cited only to an earlier Fifth Circuit case, *Atteberry v. Nocona Gen. Hosp.*, 430 F.3d 245 (5th Cir. 2005). However, *Atteberry* affirmed the district court's determination that qualified immunity should be denied because, *based on the state of the law* at the time the conduct occurred, people in defendants' position would have known the alleged conduct was unconstitutional. That is the correct analysis. *Atteberry* does not support the ruling below.

The Fifth Circuit's peculiar analysis can readily be shown to be incorrect. If the court rather than the jury is allowed to answer the question of whether the arrest was reasonable, then the jury would not be asked to answer that question as part of its charge. But according to the federal pattern jury charge, that is a principal jury question in a case alleging false arrest. See 3B Fed. Jury Prac. & Instr. §165.83 (5th ed.), pocket part (emphasis added):

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[5] See App. 10, n.2. While not applicable to the qualified immunity issues, the Fifth Circuit also incorrectly stated that Quinn did not produce any evidence of unconstitutional conduct. Actually, Quinn produced the *only* such evidence in the entire case: the affidavit of Melvin Tucker, App. 67-80.

§165.83. Special verdict form – False arrest and malicious prosecution.

SECTION I

1. Do you find defendant Jose Quiles liable for violating plaintiff John Quinn's constitutional right to be free from false arrest?

Answer: ____ Yes ____ No

If you have answered "Yes" to question 1, please proceed to question 2 below. If you answered "No" to question 1, then do not answer question 2.

2. Answer this question only if you answered "yes" to question 1: What amount do you award John Quinn as compensatory damages or nominal damages for the violation of his right under the U.S. Constitution to be free from false arrest?

Answer: $_____

Please proceed to Section II.

SECTION II (Only to be answered if you answered "Yes" to question 1 in Section I)

3. *Was it objectively reasonable for Jose Quiles to believe there was probable cause to arrest plaintiff John Quinn for the offense of aggravated sexual assault of a child?*

Answer: ____ Yes ____ No

Unless the pattern jury charge is in error (which it is not), then *the jury* is charged with answering the "objective reasonableness" question about Officer Quiles's conduct in question 3 above.[6] This is simply not a question the court has the Constitutional authority to answer.

The Fifth Circuit claims that its unique hybrid-fact/law inquiry into objective reasonableness is nothing more than "two sides of the same analytical coin." App. 10, n.2. This is likewise incorrect. As shown above, the proper legal inquiry for qualified immunity purposes does not consider whether the defendant's conduct was or was not factually or "objectively" reasonable. The *proper* inquiry for qualified immunity only asks whether the state of the law is such that an officer of reasonable competence would know that what the plaintiff has accused the defendant of doing is unconstitutional. Qualified immunity is all about fair warning gleaned from the current state of the law.[7]

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[6] The Fifth Circuit believes this is a question for the court to answer: "The district court held that a reasonable officer could have concluded that there was probable cause at the time that Quiles executed the probable cause affidavit . . . ". App. at 12. The pattern jury charge belies this methodology.

[7] "If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Harlow*, 457 U.S. at 818. If on the other hand the law is clear, then the official cannot obtain qualified immunity.

Logically then, in order to answer the relevant question the court must determine what the state of the law is because only then may the court know whether the state of the law was clear enough to provide the defendant with fair warning that the alleged conduct was unconstitutional.

But the Fifth Circuit never considered the state of the law as to whether a police officer may constitutionally arrest someone based only on an uncorroborated outcry made by an informant of unknown reliability. Two cases cited to the court below, *Hale v. Fish*, 899 F.2d 390 (5th Cir. 1990), and *Ripson v. Alles*, 21 F.3d 805 (8th Cir. 1994), both hold that an arrest made under the precise conditions of this case is unconstitutional under the Fourth Amendment. In 2004, that had been the state of the law for at least fourteen years.

Because the Fifth Circuit strayed from the proper analysis for deciding a qualified immunity case, certiorari should be granted to correct this error and to prevent future courts from relying on the Quinn precedent and thereby make the same mistake.

C. A conflict among the circuits exists and certiorari is necessary to eliminate it. The Fifth Circuit's prong 2B question is found nowhere in the jurisprudence of this Court or in any other properly-decided immunity case law. The decision below thus creates a conflict among the circuits on the issue of whether "fair warning" is the correct prong 2 standard for qualified immunity.

Given the loyalty to this Court's qualified-immunity precedents found in every other circuit, if Quinn's case had been filed in any circuit but the Fifth, he would have won and not lost. That is because every other federal circuit court that has considered qualified immunity defenses since 2001 has utilized *Saucier*'s prong 2 "fair warning" standard and not the flawed, three-pronged test used by the Fifth Circuit below. See: *Suboh v. District Attorney's Office of Suffolk District*, 298 F.3d 81 (1st Cir. 2002); *Loria v. Gorman*, 306 F.3d 1271 (2nd Cir. 2002); *Farm Labor Organizing Committee v. Ohio State Highway Patrol*, 308 F.3d 523 (6th Cir. 2002); *Michael C. v. Gresbach*, 526 F.3d 1008 (7th Cir. 2008); *Shade v. City of Farmington*, 309 F.3d 1054 (8th Cir. 2002); *Wilkins v. DeReyes*, 528 F.3d 790 (10th Cir. 2008); *Kingsland v. City of Miami*, 382 F.3d 1220 (11th Cir. 2004). Indeed, the Fifth is the *only* circuit to employ the erroneous "prong 2B" analysis.

This Court has also faithfully applied the *Saucier* 2-prong analysis each time it has encountered a qualified immunity defense, deciding in each case:

> (1) whether the plaintiff had fulfilled prong 1 by pleading facts supporting a viable cause of action (e.g., cases decided based on prong 1 include: *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009); *Morse v. Frederick*, 551 U.S. 393 (2007); *Wilkie v. Robbins*, 551 U.S. 537 (2007); and *Scott v. Harris*, 550 U.S. 372 (2007)), or

> (2) whether the state of the law was sufficiently clear to have given the defendant "fair warning" that the conduct in issue was unconstitutional (e.g., cases decided based on prong 2 include: *Pearson v. Callahan*, 129 S.Ct. 808 (2009); *Brosseau v. Haugen*, 543 U.S. 194 (2004); and *Hope v. Pelzer*, 536 U.S. 730 (2002)).

Giving the Fifth Circuit the benefit of the doubt, perhaps the phrase "objectively reasonable" has itself somehow confused the court. If so, that confusion is unwarranted. This Court's pronouncement in *Crawford-El v. Britton*, 523 U.S. 574 (1998), settled the issue once and for all about the proper interplay of the term "objectively reasonable" and the state of the law. While *Crawford-El* used the phrase "conduct that was objectively reasonable," it did not mean the court should delve into the factual reasonableness of the conduct itself at the qualified immunity stage of the case. A more thoughtful analysis of *Crawford-El* bears this out:

> While there is obvious unfairness in imposing liability – indeed, even in compelling the defendant to bear the burdens of discovery and trial – for engaging in conduct that was objectively reasonable when it occurred, no such unfairness can be attributed to holding one accountable for actions that he or she knew, or should have known, violated the constitutional rights of the plaintiff. *Harlow* itself said as much: "If the law was clearly established, the immunity defense ordinarily should fail,

> since a reasonably competent public official should know the law governing his conduct." *Id.*, at 818-819, 102 S.Ct., at 2738; see also *Butz [v. Economou]*, 438 U.S. [478], at 506, 98 S.Ct., at 2911 [1978] ("[I]t is not unfair to hold liable the official who knows or should know he is acting outside the law . . . ").

Crawford-El, 523 U.S. at 588. More recently, in *Hope*, 536 U.S. at 741, this Court held (emphasis added):

> Accordingly, pursuant to *Lanier*, the salient question that the Court of Appeals ought to have asked is *whether the state of the law in 1995 gave respondents fair warning* that their alleged treatment of Hope was unconstitutional.

By definition, then, an officer can only act in an objectively reasonable manner if he does not or should not know that his conduct is unconstitutional based on present law. In other words, the defendant's alleged conduct can only be "objectively reasonable" *for qualified immunity purposes* if that conduct does not violate settled law. The converse is also true: a defendant acts in an objectively *un*reasonable manner for qualified immunity purposes if he violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457

U.S. at 818.[8] This concept is followed and applied in every circuit except the Fifth.

Qualified immunity depends on the state of the law, and if prior case law (or common sense)[9] gave the defendant fair warning that the subject conduct is unconstitutional, then qualified immunity is not available.

In our case, there are at least two prior, on-point cases holding that arresting someone based on the uncorroborated outcry of an informant of unknown reliability is unconstitutional (*Hale* and *Ripson*), so qualified immunity should have been denied to Officer Quiles because he had plenty of fair warning that his actions were unlawful. Indeed, the *Ripson* case could not be factually and legally more on point;

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[8] See also *Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336, 1343 (7th Cir. 1985): "The Supreme Court [in *Harlow*] spoke exclusively in terms of 'clearly established' law. This suggests that an official may escape liability for acts which could possibly be considered to violate a constitutional right if the right violated was not clearly established." And "clearly established" means (a) similar conduct has been found unlawful in a prior case, or (b) the conduct is so inherently outrageous that even without a prior case with similar facts the conduct would be known by all thinking people to be unreasonable and hence unlawful.

[9] An example of a "common sense" case might be one where welfare workers are accused of selling foster children into slavery. Just because no prior case law has found such conduct unlawful would be no reason to grant qualified immunity. Common sense supplements the federal reporters. *K.H. Through Murphy v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990).

that case is virtually a mirror image of this one – except for the result – and thus presents a classic conflict between the circuits on this important issue.

Because it is based on fair warning, qualified immunity somewhat parallels what law school professors call the "first bite" rule. Government officials get a "bye" only when they are the first to engage in a particular form of conduct, but once that conduct is held to be unlawful, all *future* officials are now on notice and do not get qualified immunity if they engage in that same or similar conduct. This is the exact holding in *Harlow*:

> Reliance on the objective reasonableness of an official's conduct, *as measured by reference to clearly established law,* should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. *On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred.* If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. . . . *If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct.*

Harlow, 457 U.S. at 818-19 (emphasis added). *Harlow* could not be more clear: the issue in qualified immunity cases is the present "state of the law" and not whether a court believes the conduct at issue ultimately was or was not "reasonable" on the merits as the Fifth Circuit has opined.[10]

The Fifth Circuit never considered whether the state of the law was such that arresting someone based only on the uncorroborated outcry of an informant of unknown reliability violated the suspect's constitutional rights, so there is no way the Fifth Circuit could possibly have engaged in the proper qualified-immunity analysis – by definition. The Fifth Circuit not only ignored the correct 2-prong analysis by not considering the state of the law, but it substituted an improper, fact-based 3-pronged analysis and in doing so confounded the law of qualified immunity, placed itself in conflict with every

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[10] The Fifth Circuit's delineation of the inquiry as "objectively reasonable" (and thus, to its thinking, a question of law) rather than just "reasonable" (which all agree is a question of fact) does not hold water. *All* questions of reasonableness are based on an objective analysis, so the term "reasonable" means the same thing as "objectively reasonable." Adding the word "objectively" is superfluous and does not convert the inquiry from a factual question into a legal one by some sort of judicial alchemy as the Fifth Circuit apparently believes. Indeed, the federal pattern jury charge quoted above itself uses the term "objectively reasonable" as the third *jury* question asked in cases of this nature. If this is a legal question, why is the jury being asked to answer it?

other circuit and this Court's precedent, and improperly denied Mr. Quinn his day in court.

D. The state of the law is clear and negates the ruling below. Police officers hear stories every day in their jobs. But all competent officers know from the *Hale* and *Ripson* cases (and perhaps even from common sense) that an arrest based solely on the uncorroborated story of an informant of unknown reliability would not be an arrest based on probable cause and would thus violate the suspect's constitutional rights.

Defendant Quiles admitted that all he had to go on to suspect this crime had been committed was the uncorroborated story of an informant of unknown reliability, a story completely unsupported by any physical evidence.[11] He also admitted that hearing a story (even three different versions of the same story) may be enough for reasonable suspicion and thus trigger an investigation, but it does not provide probable cause sufficient to support an arrest.[12] Officer Quiles is not entitled to qualified immunity in these circumstances.

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[11] App. 53-54, 56-57, and 62-66.

[12] App. 53-54 and 62. Somehow, Officer Quiles then decided that hearing the same story a fourth time pushed him from reasonable suspicion to probable cause. A less logical analysis by a police officer is difficult to imagine. Even the Fifth Circuit was critical of Quiles on this point. App. 13-14.

Certiorari should be granted to correct the decision of the Fifth Circuit and to bring the Fifth Circuit back in line with all other circuits and the binding precedents of this Court.

II. The Fifth Circuit is in conflict with other circuits because it ignored the presumptions relating to prosecutorial immunity.

Here again, if Quinn's case had been brought in any circuit court other than the Fifth, the outcome below would have been the opposite of what occurred. This should not be permitted.

A. Advocacy is the linchpin of prosecutorial immunity. Settled law holds that prosecutors do not receive prosecutorial immunity unless they can show the conduct they are accused of involves "advocacy." *Briggs v. Goodwin*, 569 F.2d 10 (C.A.D.C.), *cert. denied*, 437 U.S. 904 (1978).[13] Said another way, prosecutorial immunity only exists when the functions under review are "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409, 430

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[13] The *Briggs* case is not factually on point, but it contains an in-depth, scholarly discussion of the history and basis for prosecutorial immunity, and the public-policy reasoning behind its implementation (or denial) in a particular case. *Briggs* compels a finding that the grant of prosecutorial immunity in this case is error. Because the decision below does not accord with the analysis in *Briggs*, a conflict in the circuits is present.

(1976). This rule was affirmed just last term in *Van de Kamp v. Goldstein*, 129 S.Ct. 855 (2009).[14]

Van de Kamp was recently cited by *Atherton v. District of Columbia Office of Mayor*, 567 F.3d 672 (C.A.D.C. 2009), a case in which the court refused to allow absolute immunity to the prosecutor because his role did not involve "advocatory functions" or "discretion" but rather only actions that "could have been performed by anyone." Accord: *Kalina v. Fletcher*, 522 U.S. 118 (1997) (no immunity for actions that do not require a prosecutor's legal skill or advocacy), and *Harlow*, 457 U.S. at 816-18 (distinguishing discretionary from ministerial functions, only the former of which qualify for immunity). In our case, dismissal of the charges against Quinn in

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[14] An additional reason to grant certiorari is because the Fifth Circuit read the *Van de Kamp* case far too broadly and other courts may do likewise. The Fifth Circuit apparently felt *Van de Kamp* changed the law such that *all* actions taken by prosecutors, even those not involving advocacy functions, now qualify for absolute immunity. But the actual holding in *Van de Kamp* is much more narrow. The defendant in that case received immunity because his actions in training prosecutors for courtroom work "necessarily require[d] legal knowledge and the exercise of related discretion" (*Van de Kamp*, 129 S.Ct. at 862) and because they were "directly connected with the prosecutor's basic trial advocacy duties" (*Id.* at 863). The Court also found it would be anomalous to hold that the person engaged in the courtroom work itself was immune but the person training them for that exact function would not be. *Van de Kamp* does not say that all conduct by prosecutors occurring outside the courtroom qualifies for immunity; the analysis still requires a functional approach – except in the Fifth Circuit.

compliance with the Texas speedy-trial statute likewise could have been performed by anyone in the prosecutor's office, such as a clerk, and did not involve discretion or advocatory functions but only ministerial action. The Fifth Circuit's ruling is thus in direct conflict with the holdings in *Atherton*, *Kalina*, and *Harlow*, and for that reason should be overturned.

B. The prosecutors did not overcome the "no immunity" presumption. This Court has always held very tightly to the rule that absolute immunity, such as prosecutorial immunity, is only available in those rare situations that were subject to an established immunity in 1871 when the civil rights act was passed. Indeed, this Court has gone so far as to hold that there is a double presumption *against* prosecutorial immunity, and the burden is on the defendant seeking such immunity to show two things: (a) that the type of conduct or function at issue was immune from liability in 1871, and (b) present-day public policy dictates that immunity should continue to shield that conduct from liability today.[15] *Buckley*, 509 U.S. at 269:

> Even when we can identify a common-law tradition of absolute immunity for a given function, we have considered 'whether §1983's history or purposes nonetheless

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[15] *Harlow*, 457 U.S. at 812: "The burden of justifying absolute immunity rests on the official asserting the claim."

> counsel against recognizing the same immunity in §1983 actions.' *Tower v. Glover*, 467 U.S. [914], at 920, 104 S.Ct., at 2825 [1984]. Not surprisingly, we have been 'quite sparing' in recognizing absolute immunity for state actors in this [§1983] context. *Forrester v. White*, 484 U.S. 219, 224, 108 S.Ct. 538, 542, 98 L.Ed.2d 555 (1988).

If the defendant does not prove both elements – historical basis and current policy – the ordinary presumption *against* absolute immunity controls.

Here, the Prosecutors not only did not meet their twin burdens above, they did not even attempt to do so. Nowhere in the Prosecutors' briefing did they argue – much less prove – that the conduct under review (i.e., disobeying statutory direction related to speedy trial) was immune from liability in 1871, nor did they make or cite the court to any arguments or case authority favoring the existence/continuation of such immunity under present-day public policy. Despite the Prosecutors' total failure to address and overcome this Court's no-immunity presumptions, the Fifth Circuit affirmed the trial court's grant of absolute immunity and thus erred.

Had the Prosecutors attempted to overcome the no-immunity presumption, they would have certainly failed. First, even without the impact of Texas Code of Criminal Procedure, art. 32.01, they waited more than a year after arrest to put the case to trial or even to seek an indictment so they are presumed to have violated the Constitution. *Doggett v. U.S.*, 505

U.S. 647, 652 n.1 (1992) (a post-accusation delay of one year is generally considered "presumptively prejudicial" and triggers speedy-trial issues). Second, it is inconceivable that any prosecutor ever had, or should have, immunity of any kind when he violates a controlling statute that requires him to take specific administrative action within a strictly-prescribed, inflexible length of time, a statute specifically designed to protect important Constitutional rights. The statute in question, Texas Code of Crim. Proc., art. 32.01, is the Texas version of the statute this Court indicated the states could pass in order to make more-certain the time frame within which a "speedy trial" must occur. *Barker v. Wingo*, 407 U.S. 514, 523 (1972). Unless the Court has withdrawn this invitation to the states, Quinn's Constitutional right to a speedy trial has been violated *as a matter of law*.

Having admitted to violating the speedy-trial statute, the Prosecutors were relegated to arguing "because we are prosecutors, we have immunity" and they made no effort whatsoever to support such a sweeping misconception. Indeed, that argument is foreclosed by this Court's well-settled case law which holds that immunity for prosecutors is based on the function they are performing, not on their job title.[16]

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[16] See *Imbler*, 424 U.S. at 431 ("We agree with the Court of Appeals that respondent's *activities* were intimately associated with the judicial phase of the criminal process, and thus were *functions* to which the reasons for absolute immunity apply with

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This rule controls everywhere except in the Fifth Circuit.

Because the Prosecutors did not overcome the no-immunity presumption or show that their actions involved advocacy, the decision of the Fifth Circuit must be reversed or this Court must abandon the no-immunity presumptions and the advocacy-only rule and replace them with alternative tests for the lower courts to use.

III. Certiorari should be granted to make clear that prosecutors may not ignore statutory law that expressly governs their conduct and still obtain prosecutorial or qualified immunity.

There are no cases directly on point for the assertion that prosecutors must obey on-point, controlling statutes (which, by definition, provide "fair warning" of their terms) in order to be entitled to immunity, but no other rule makes much sense.

Here, the Prosecutors do not dispute that by failing to dismiss the case or take it to the grand jury by the statutory deadline, they violated Texas Code of Crim. Proc., art. 32.01. Nor could they dispute it; violation of the statute is conclusively shown by resort to a calendar. By analogy, one prior case held

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full force") (emphasis added). See also, *Buckley*, 509 U.S. at 277; *Burns*, 500 U.S. at 486; and *Harlow*, 457 U.S. at 811, n.16 (no immunity for administrative tasks).

that when a prosecutor violated a court order his violation stripped him of *all* immunities. *White by Swafford v. Gerbitz*, 860 F.2d 661, 665 n.4 (6th Cir.), *cert. denied*, 489 U.S. 1028 (1989). It seems inconsistent at best to say a prosecutor forfeits his immunity by violating a court order containing arguably-ambiguous language like "immediately," but he may obtain immunity when he violates an unambiguous, controlling statute expressly designed to control his administrative functions.

IV. County employees sued in their individual capacities are not entitled to sovereign immunity because only State-government employees qualify for that form of immunity and then only when they are sued in their official capacity.

According to *Alden v. Maine*, city and county governments do not enjoy sovereign immunity, also sometimes called "Eleventh Amendment" immunity.

The Fifth Circuit, citing only to a footnote in another case out of that same circuit, held that if prosecutors are in the process of prosecuting state criminal laws, they are deemed "state actors" for purposes of sovereign immunity (citing to *Esteves v. Brock*, 106 F.3d 674 (5th Cir. 1997)). The problem with both the ruling below and the *Esteves* footnote is that they are directly contrary to the express holding of *Alden v. Maine* that "lesser entities" like cities and counties do not qualify for sovereign immunity, and

neither do *any* government employees sued in their individual capacity. Therefore, either *Alden v. Maine* must be overruled in favor of the *Esteves* rule, or the Fifth Circuit's decision below must be reversed; they may not logically co-exist.

There are at least three good reasons *Alden v. Maine* provides the better rule. First, it draws a bright line for the guidance of the lower courts as to who is entitled to sovereign immunity and who is not. No guessing is needed as to whether the defendant is pursuing a "state" function or a "county" function; the decision is controlled by who employs the defendant.

Second and perhaps more importantly, the *Alden v. Maine* rule is faithful to the text of the Eleventh Amendment itself, which clearly says that it applies only to "any suit in law or equity, commenced or prosecuted *against one of the United States*" (emphasis added).[17] Suits against county prosecutors are not suits "against one of the United States."

Third, there is no reason to extend sovereign immunity to county prosecutors even in their official capacities, since any recovery against them will not

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[17] Counsel is aware that state sovereign immunity is not technically "provided by" the Eleventh Amendment but is rather a common law immunity protected from the federal government's encroachment by that Amendment.

be paid out of the State's treasury – the main "harm" sought to be alleviated by sovereign immunity.[18]

Even if an "*Esteves* exception" might be adopted for the *Alden v. Maine* rule, that exception, at least as presently formulated by the Fifth Circuit, would still not apply in this case by its own terms. *Esteves* involved a county prosecutor exercising pre-emptory juror challenges while prosecuting a state felony charge in court, and prosecutorial immunity was granted to her based on the function being performed. Also, Brock was apparently being sued only in her official, not her individual, capacity. In addition, the dicta from *Esteves* cited by the Prosecutors below concerned only whether the county or the state would be responsible for any damages awarded, not whether the prosecutor herself was entitled to immunity.

In this case, the Prosecutors were not litigating criminal statutes in court, but were only dealing with issues of procedure (i.e., they were performing, or rather *not* performing, purely administrative functions). The Prosecutors have also been sued in their individual capacity so even if they are deemed "state employees," they are not entitled to sovereign immunity under *Alden* or *Esteves*.

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[18] It is uncontroverted that any damage award against the Prosecutors in this case will be paid from county resources, not those of the State of Texas.

Finally, by granting sovereign immunity to the Prosecutors in their individual capacities, the Fifth Circuit once again finds itself in direct conflict with nearly every other circuit, including the First,[19] Second,[20] Third,[21] Fourth,[22] Sixth,[23] Seventh,[24] Ninth,[25] Tenth,[26] and Eleventh.[27] The Supreme Court should not allow the Fifth Circuit to have its own "special" rules that only apply to cases filed in that circuit.

The traditional grounds for sovereign immunity are completely absent in this case. The Fifth Circuit's ruling granting sovereign immunity to the Prosecutors is in conflict with other circuits and with the precedents of this Court, and must therefore be corrected.

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[19] *Redondo-Borges v. U.S. Dep't of HUD*, 421 F.3d 1, 7 (1st Cir. 2005).

[20] *Liffiton v. Keuker*, 850 F.2d 73, 78 (2nd Cir. 1988).

[21] *Walker v. Zenk*, 2009 WL 886241 at *2 (3rd Cir. 2009).

[22] *South Carolina State Ports Auth. v. Federal Maritime Comm'n*, 243 F.3d 165, 177 (4th Cir. 2001).

[23] *Skinner v. Govorchin*, 463 F.3d 518, 524 (6th Cir. 2006).

[24] *Brokaw v. Mercer County*, 235 F.3d 1000, 1009 (7th Cir. 2000) (holding that when a state official is sued, the ordinary presumption that the suit is in an "official" capacity is negated when the defendants assert qualified immunity – a personal defense – as barring the case. The Prosecutors pleaded qualified immunity in this case).

[25] *Miranda v. Kitzhaber*, 328 F.3d 1181, 1190 (9th Cir. 2003).

[26] *Pleasant v. Lovell*, 876 F.2d 787, 793 (10th Cir. 1989).

[27] *Bolin v. Story*, 225 F.3d 1234, 1238 n. 4 (11th Cir. 2000).

V. Certiorari should be granted to clarify whether a §1983 plaintiff may recover money damages as a remedy for violation of his Sixth Amendment right to a speedy trial.

This presents a question of first impression. The lower courts found that because Quinn was not seeking reversal of a criminal conviction, he had not alleged a violation of the Sixth Amendment for which relief may be granted. To translate: according to the courts below, the only remedy available to a plaintiff for violation of his Constitutional rights to a speedy trial is reversal of a criminal conviction and a new trial.[28] This should not be the law.

Determining a violation of the right to speedy trial involves a balancing test of the following factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to speedy trial; and (4) *the prejudice to the defendant resulting from the delay*. *Barker v. Wingo*, 407 U.S. at 531. While this prejudice will often manifest itself in an unfair trial, there is no reason based on the text of the Sixth Amendment, the history or text of §1983, or any prior Supreme Court case law, to find that other remedies for this Constitutional violation should not be available.

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[28] App. 23, n.7.

Barker held that impairment of the criminal defense is only one of the distinct harms sought to be prevented by a speedy trial. "A fourth factor is prejudice to the defendant." See *Barker*, 407 U.S. at 532-33 (emphasis added):

> Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) *to minimize anxiety and concern of the accused*; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. . . . Finally, even if an accused is not incarcerated prior to trial, *he is still disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility*.

Is any greater anxiety or hostility possible? Quinn was arrested on the charge of raping his own 8-year-old daughter – a crime arguably more infamous than murder, kidnaping, and treason combined. It was impossible for Quinn to obtain or keep gainful employment in any noble occupation while such charges were pending. Having those charges pending for nine months was bad enough, but to have them

pending *illegally* for an *additional* eight months[29] – when a controlling statute was supposed to prevent that from happening, when Quinn was constantly asking the Prosecutors to immediately bring the case to the grand jury so his name could be cleared, and when the Prosecutors had no basis to believe a crime had actually been committed – is unconscionable and should be actionable under §1983.

The express purpose of Texas Code Crim. Proc. art. 32.01 is to compel the state to either seek and obtain an indictment or release the defendant without undue delay in order to avoid violating the accused's rights to due process under the Fourteenth Amendment and rights to speedy trial under the Sixth Amendment. *State v. Meshell*, 23 S.W.3d 370 (Tex. App. – Houston [1st Dist.] 1999, no pet.). If prosecutors can violate it with impunity, the statute is a dead letter and so are the Sixth Amendment rights it is designed to protect.

The Fifth Circuit also held there is no speedy trial right unless the defendant is indicted.[30] This is

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[29] To calculate the deadline, the "terms" of the grand jury in Collin County are from January 1 to June 30, and from July 1 to December 31. A suspect arrested in September must therefore be brought to the grand jury no later than June 30 of the following year.

[30] The Fifth Circuit cited *United States v. MacDonald*, 435 U.S. 850 (1978), for its holding that an indictment must issue before a person may complain about a Sixth Amendment violation. However, Jeffrey MacDonald was seeking to invoke the Sixth Amendment before he was *arrested*, not just before he

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stunningly incorrect and is apparently another "rule" indigenous only to the Fifth Circuit. In discussing the rationale for the Sixth Amendment's speedy trial provision, the Court held in *United States v. Marion*, 404 U.S. 307, 320-21 (1971): "*Invocation of the speedy trial provision thus need not await indictment,* information, or other formal charge. . . . Until [arrest] occurs, a citizen suffers no restraints on his liberty and is not the subject of public accusation: his situation does not compare with that of a defendant who has been arrested and held to answer."[31]

Contrary to the holding of the Fifth Circuit below, the Sixth Amendment protects citizens at all

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was indicted, so *MacDonald* does not support the Fifth Circuit's reasoning. Posing yet another circuit conflict, the Sixth (*United States v. Watford*, 468 F.3d 891, 901 n.4 (6th Cir. 2006)) and Seventh (*United States v. Figueroa*, 228 Fed.Appx. 611, 613 (7th Cir. 2007)), cite to *MacDonald* for the opposite – and correct – holding in that case, namely that *arrest* triggers the Sixth Amendment.

[31] See also, *Doggett*, 505 U.S. at 648 ("In this case we consider whether the delay of 8½ years between petitioner's indictment and arrest violated his Sixth Amendment right to a speedy trial. We hold that it did"). The Fifth Circuit once again finds itself not only in conflict with this Court's settled law, but also with the other circuits on this point. See, *United States v. Jenkins-Watts*, ___ F.3d ___, 2009 WL 2366404, *12 (8th Cir. 2009) ("The Sixth Amendment right attaches at the time of arrest or indictment, whichever occurs first"); *United States v. DeGrasse*, 258 Fed.Appx. 485, 487 n.2 (3rd Cir. 2007) (same); and *United States v. Knight*, 562 F.3d 1314, 1323 (11th Cir. 2009) (same; ironically citing a Fifth Circuit case as authority, *United States v. Walters*, 591 F.2d 1195 (5th Cir. 1979)).

times post-arrest through judgment. But such "protection" will often be illusory if a violation of the right can only be addressed by reversal of a conviction. Such a rule would not address any situation in which a conviction does not occur. Does the existence of a defendant's Constitutional right to a speedy trial really depend on whether the state has a case strong enough to win – the weaker the state's case, the lesser the defendant's Constitutional rights? If so, that seems perplexingly counter-intuitive.

The question posed is: may Quinn recover money damages as a remedy under §1983, or is reversal of a criminal conviction the only remedy he has for violation of his right to speedy trial? This is a question of first impression.[32]

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[32] However, see *Blake v. Katter*, 693 F.2d 677 (7th Cir. 1982), *overruled o.g., Wilson v. Garcia*, 471 U.S. 261 (1985), which suggested that money damages may be recoverable as a remedy for violation of the Sixth Amendment's speedy trial guaranty (suggested because the court allowed that claim to go forward being litigated only by Blake's widow, who could only have been seeking money damages as a remedy). We found no Supreme Court cases directly on point where such damages have been awarded, nor did we find any where they were sought but denied. *Strunk v. U.S.*, 412 U.S. 434 (1973) is sometimes cited as a case holding that dismissal of the charges is the "only" remedy for violation of the Sixth Amendment, but that case merely held that *reduction in sentence*, in lieu of complete dismissal, was not an available remedy for a Sixth Amendment violation; it did not hold that money damages may never be considered as a remedy under §1983 because that issue was not litigated in that case. *Id.*, 412 U.S. at 437.

Because the Sixth Amendment is triggered at the time of arrest, if this Court decides money damages is a proper remedy, then Quinn has set forth a viable claim for violation of the Sixth Amendment and thus a claim under §1983. The Fifth Circuit's dismissal of those claims under prong 1 of the qualified immunity analysis would then be an error that should be corrected.

CONCLUSION

"I heard a story – you're under arrest."

Those words do not fulfill the stringent Constitutional requirement known as "probable cause." Yet, those words precisely sum up what happened to Mr. Quinn in September 2004. Admittedly acting on nothing more than the long-delayed, uncorroborated outcry of an informant of unknown reliability made during a time of great personal stress, the police had Mr. Quinn arrested for the most heinous crime a man can be accused of: raping his own child. When sued, the police officer is then given qualified immunity because *the court* – not the jury – believes the officer when he said he "thought" he had probable cause to arrest, the court refuses to "second guess" the officer's assertion in that regard, the court disregards the expert opinion of a renowned police-procedures expert, and the court ignores the state of the law, the clear precedents of this Court, and the rulings of all

other circuit courts. Clearly a bad day for Mr. Quinn – but an even worse day for the rule of law.

Tragically, the story does not end there. After his illegal arrest, the charges against Mr. Quinn were allowed to remain pending illegally for an additional eight months despite the existence of an on-point statute that expressly required the prosecutors to either dismiss the charges or take them to a grand jury within eight months and 26 days of the arrest. But for his successful habeas corpus action, Mr. Quinn might remain under arrest in Collin County, Texas – with these horrific, life-altering charges still pending against him – to this very day.

His reputation scourged, his pocketbook drained of $40,000 in defense costs, his livelihood destroyed, and his psyche permanently scarred by the police and the prosecutors, Mr. Quinn filed suit under 42 U.S.C. §1983 to remedy the wrongs done to him. But the courts below were not open to hear Mr. Quinn's plea for justice. Instead, they ignored and twisted immunity laws to achieve what seems to have been a pre-determined outcome unique to cases that happen to be filed in the Fifth Circuit. The police officer who admittedly did not have probable cause to arrest, and the prosecutors who admittedly violated the Texas speedy-indictment statute, both walk away with no consequences for conduct they concede was unconstitutional. If this is the law, then there is something terribly, terribly wrong. Fortunately, it is not.

The law presently found in the settled jurisprudence of this Court, and in the precedents of all other circuits, fully justifies – even compels – reversal of the Fifth Circuit's decision. The errors below are numerous, deep-seated, and should not be allowed to stand.

Mr. Quinn respectfully asks this Honorable Court to issue a writ of certiorari so the decisions below may be corrected, for Mr. Quinn's sake, for the sake of consistency and uniformity among the circuits, and in order to ensure that such ill-advised rulings are not perpetuated.

Respectfully submitted,

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2009 WL 1181072

United States Court of Appeals,
Fifth Circuit.
John QUINN, Plaintiff-Appellant
v.
John ROACH, individually and in his official capacity as Collin Co District Attorney; Gail Leyko, individually and in official capacity as Collin Co Assistant District Attorney; Manuel Gonzales, individually and in official capacity as Collin Co Assistant District Attorney; Curtis Howard, individually and in official capacity as Collin Co Assistant District Attorney; Kristi Tyler, individually and in official capacity as Collin Co Assistant District Attorney; Michelle Voirin, individually and in official capacity as Collin Co Assistant District Attorney; Jose Quiles, individually and in official capacity as McKinney Texas police officer; John Does, 1-5 Defendants, individually and in their official capacity as McKinney Texas police officers; Laurie Houston; Katie Quinn; Collin County Texas; City of McKinney, Defendants-Appellees.
No. 08-40633.

May 4, 2009.

James A. Pikl, McKinney, TX, for Plaintiff-Appellant.

Robert Jacob Davis, Matthews, Stein, Shields, Pearce, Knott, Eden & Davis, John Francis Roehm, III, Fanning, Harper & Martinson, Dallas, TX, for Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Texas, USDC No. 4:06-CV-120.

Before JONES, Chief Judge, and WIENER and BENAVIDES, Circuit Judges.

FORTUNATO P. BENAVIDES, Circuit Judge:*

This civil suit stems from the arrest of the plaintiff-appellant, John Quinn ("Quinn"), for the alleged sexual assault of his daughter, Katie Quinn, when she was a young child, and the subsequent fifteen-month delay in the presentation of his criminal case to the grand jury. Quinn filed suit against Collin County, Texas; the Collin County District Attorney and a number of assistant district attorneys (together, "the District Attorney Defendants"); the City of McKinney, Texas; and the city police officer who secured the arrest warrant, Detective Jose Quiles.[1]

The claims in this case can be divided into two groups: (1) those dealing with the initial arrest; and (2) those dealing with the subsequent fifteen-month delay in the presentation of the case to the grand jury. Quinn's claims against Detective Quiles and the City (together, the "City Defendants") relate to the

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

[1] Quinn also filed suit against his ex-wife, Laurie Houston, and Katie Quinn. Those claims are not at issue in this appeal.

procurement of the arrest warrant. Quinn sued Quiles and the City under 42 U.S.C. § 1983 for violating Quinn's right to be free from unreasonable seizures under the Fourth Amendment and right to due process and equal protection under the Fifth and Fourteenth Amendments, for malicious prosecution under state and federal law, and for false arrest and imprisonment and various forms of negligence under state law. Quinn's claims against Collin County, the Collin County District Attorney, and the assistant district attorneys (together, "the County Defendants") relate to the fifteen-month delay in the presentation of his case to the grand jury. Quinn sued the County Defendants under § 1983 for violating his right to a speedy trial under the Sixth Amendment and his right to due process under the Fifth and Fourteenth Amendments, and for negligence under state law. Quinn sought money damages against all of the defendants-appellees, as well as injunctive relief against the County Defendants.

Both the County Defendants and the City Defendants filed motions to dismiss all claims under Fed.R.Civ.P. 12(b)(6), and Detective Quiles also filed a motion for summary judgment on all claims against him. With regard to Quinn's claims relating to the procurement of the arrest warrant, the district court held: (1) that he had failed to state an equal protection claim because he was not a member of a protected class; (2) that he had failed to state a claim for malicious prosecution under federal law because no such freestanding claim exists; (3) that any

federal-law claims against Quiles in his official capacity were duplicative of the federal-law claims against the City and should therefore be dismissed; (4) that Quinn had failed to state a claim against Quiles in his official capacity under state law because any such claims were barred by sovereign immunity; (5) that he had failed to state a claim against the City for negligence because such a claim was barred by sovereign immunity; (6) that Quiles was entitled to summary judgment on the issue of qualified immunity from Quinn's claims under § 1983 on the grounds that Quiles's determination of probable cause was objectively reasonable and Quinn was not deprived of any procedural due process rights; and (7) that Quiles was entitled to summary judgment on the issue of official immunity from Quinn's state-law claims because Quiles's actions in procuring the arrest warrant were discretionary, made in good faith, and made within the scope of his authority.

The district court dismissed all of Quinn's claims relating to the fifteen-month delay in the presentation of his case to the grand jury, holding: (1) that the delay did not violate any of Quinn's constitutional rights; (2) that the District Attorney Defendants were protected by qualified immunity and prosecutorial immunity from being sued in their individual capacities, and by Eleventh Amendment immunity from being sued in their official capacities, for their actions in handling the criminal case against Quinn; (3) that Quinn had failed to allege the existence of an "official policy" that could subject the County to

liability under § 1983; and (4) that Quinn lacked standing to seek injunctive relief because he had failed to allege a likelihood of a future violation of his rights.

Quinn appeals the district court's holdings that Quiles enjoyed qualified and official immunity; that there is no federal cause of action for malicious prosecution; that the City enjoyed sovereign immunity; that the fifteen-month delay did not violate Quinn's constitutional rights; that the District Attorney Defendants enjoyed qualified, prosecutorial, and Eleventh Amendment immunity; and that Quinn did not have standing to pursue injunctive relief.

For the reasons stated below, we AFFIRM.

I. Background

Quinn and his former wife, Laurie Houston, divorced in 1991. Quinn was awarded custody of their two children, but one of them, Quinn's daughter Katie, went to live with Houston at some point. On July 15, 2004, Katie, who was sixteen at the time, told her mother that Quinn had been sexually abusing her since she was eight years old. Earlier that day, Katie had been arrested for shoplifting, and Katie and her mother were discussing Katie's arrest when Katie stated that she had been abused by Quinn. During that conversation, Katie attempted suicide, and she was taken to the hospital. At the hospital, Joy Turner, a nurse, performed an admission assessment on Katie. During the assessment,

Katie stated that Quinn had sexually abused her beginning when she was eight years old and ending when she was twelve. Turner reported the allegations of abuse to the Texas Department of Family and Protective Services, Child Protective Services Division ("CPS"). On July 21, 2004, Dawn Todd of the Denton County Children's Advocacy Center conducted a videotaped interview with Katie. In the interview, Katie stated that her father had engaged in sexual intercourse with her on two separate occasions, once when she was eight years old and once when she was nine or ten years old.

On July 30, 2004, Detective Quiles received a written notification of the alleged abuse from CPS (the "CPS intake report") and a copy of the videotaped interview conducted by Todd. Quiles viewed the videotape of the interview on August 9, 2004. On August 12, Laurie Houston met with Quiles and provided Quiles with a written statement regarding the events of July 15, 2004, including Katie's claim that Quinn had been sexually abusing her since she was eight years old. Houston also stated that Quinn was an alcoholic and a flight and suicide risk. On the same date, Quiles asked Houston to provide him with a copy of Katie's medical records. On August 31, 2004, Beth Hudson, a registered nurse, performed a Sexual Assault Nurse Examiner ("SANE") examination on Katie. On September 2, 2004, Quiles received an affidavit from Joy Turner, the nurse who had performed the admission assessment on Katie at the

hospital, recounting Katie's statements to her that her father had abused her from ages eight to twelve.

Based on the videotaped interview of Katie, Turner's affidavit, Houston's written and oral statements, and the CPS intake report, Quiles executed a probable cause affidavit on September 8, 2004 for Quinn's arrest. The next day, a warrant was issued for Quinn's arrest for the felony criminal offense of aggravated sexual assault of a child. Quinn was arrested by the McKinney Police Department on September 12, 2004. Quiles was not present at the arrest. Quiles was not aware of the results of the SANE examination until after Quinn's arrest. The examination revealed that Katie had a hymen tear, indicating some form of physical trauma. The report did not indicate the cause of the tear or when it had occurred.

Quinn filed a writ of habeas corpus in state court seeking release from bail because of delay, and on January 6, 2006 a state district court judge granted the writ and issued an order of dismissal. The matter was then presented to the Collin County Grand Jury, which no billed Quinn on January 10, 2006.

II. Standard of Review

This court reviews a district court's grant of summary judgment de novo, applying the same standards as the district court. *See XL Specialty Ins. Co. v. Kiewit Offshore Services, Ltd.*, 513 F.3d 146, 149 (5th Cir.2008); *Hirras v. Nat'l R.R. Passenger Corp.*, 95

F.3d 396, 399 (5th Cir.1996). Summary judgment is proper if the record reflects "that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

This court also reviews de novo a district court's grant or denial of a Rule 12(b)(6) motion to dismiss, *Frank v. Delta Airlines, Inc.*, 314 F.3d 195, 197 (5th Cir.2002), "accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiff," *Stokes v. Gann*, 498 F.3d 483, 484 (5th Cir.2007). Dismissal is appropriate when the plaintiff has not alleged "enough facts to state a claim to relief that is plausible on its face" and has failed to "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 500 U.S. 544, 555, 570 (2007).

III. Claims Relating to Quinn's Arrest

A. Qualified Immunity

The doctrine of qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In *Saucier v. Katz*, 533 U.S. 194 (2001), the Supreme Court mandated a two-step sequence for resolving government officials' qualified immunity claims: first, a court must decide whether the facts alleged or shown are sufficient to make out a violation of a constitutional

right; second, the court must decide whether the right at issue was "clearly established" at the time of the defendant's alleged misconduct. *Id.* at 201. If the official's conduct violated a clearly established constitutional right, then qualified immunity is not applicable. Prior to *Saucier,* the Court had merely suggested that "the better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all." *County of Sacramento v. Lewis,* 523 U.S. 833, 841 n.5 (1998). *Saucier* made clear that these two steps were sequential and that a court may not skip the first step and proceed directly to the second step. *See Saucier,* 533 U.S. at 201. In a very recent decision, the Court rejected the rigid sequential approach set out in *Saucier.* In *Pearson v. Callahan,* 129 S.Ct. 808 (2009), the Court held that "while the sequence set forth [in *Saucier*] is often appropriate, it should no longer be regarded as mandatory," and that judges "should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Id.* at 818.

Quinn contends that the district court did not apply the correct legal standard for qualified immunity in this case because the district court inquired into the objective reasonableness of Quiles's actions. This argument is wholly without merit, as "[t]he relevant, dispositive inquiry in determining

whether a right is clearly established [under the second step of the qualified immunity inquiry] is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."[2] *Saucier,* 533 U.S. at 202.

The district court held that Quinn had adequately alleged a violation of his Fourth, Fifth, and Fourteenth Amendment rights, but that Quiles's belief that his conduct in procuring the warrant was lawful was objectively reasonable. The issue is

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[2] This circuit has at times characterized its approach in qualified immunity cases as a three-pronged inquiry in which the traditional second prong is divided into two separate and distinct inquiries: whether the right was clearly established and whether an officer's conduct was objectively reasonable. *See, e.g., Hare v. City of Corinth, Miss.*, 135 F.3d 320, 326 (5th Cir.1998) ("The second prong of the qualified immunity test is better understood as two separate inquiries: whether the allegedly violated constitutional rights were clearly established at the time of the incident; and, if so, whether the conduct of the defendants was objectively unreasonable in the light of that then clearly established law."); *Brown v. Bryan County, Okl.*, 67 F.3d 1174, 1181 (5th Cir.1995) ("A proper analysis of a qualified immunity defense requires us to conduct a two (sometimes three) prong inquiry."), *vacated on other grounds*, 520 U.S. 397 (1997). The Supreme Court's recent case law makes it clear that these inquiries are more appropriately viewed not as separate and distinct, but as two sides of the same analytical coin. *See Pearson*, 129 S.Ct. at 818; *Saucier*, 533 U.S. at 202; *see also Conroe Creosoting Co. v. Montgomery County, Tex.*, 249 F.3d 337, 340 (5th Cir.2001) ("Second, we determine whether the constitutional right was clearly established at the time the defendant acted. A constitutional right is 'clearly established' if 'the unlawfulness of the conduct would be apparent to a reasonably competent official.' ").

whether the district court was correct that Quinn failed to raise a fact issue as to the objective reasonableness of Quiles's belief that his conduct was lawful. In the qualified immunity context, the objective reasonableness of an officer's belief that his conduct was lawful is a question of law, not fact. *See Atteberry v. Nocona Gen. Hosp.*, 430 F.3d 245, 256 (5th Cir.2005).

Quinn argues that Quiles's procurement of the arrest warrant violated clearly established law that making an arrest without probable cause violates the Fourth Amendment and that engaging in judicial deception when applying for a warrant violates the Fifth and Fourteenth Amendments. In other words, Quinn contends that it would be clear to a reasonable officer that swearing out a probable cause affidavit based on the evidence available in this case on September 8, 2004, and providing the supporting evidence to the magistrate that was in fact provided by Quiles, violated Quinn's right under the Fourth Amendment to be free from arrest in the absence of probable cause and his right under the Fifth and Fourteenth Amendments to be free from the use of judicial deception in the procurement of warrants.

The Fourth Amendment requires that an officer have probable cause for an arrest. Probable cause exists "when the totality of the facts and circumstances within a police officer's knowledge at the moment of arrest are sufficient for a reasonable person to conclude that the suspect had committed or was committing an offense." *Glenn v. City of Tyler,*

242 F.3d 307, 313 (5th Cir.2001) (citation and internal quotation marks omitted). A police officer is entitled to qualified immunity for an arrest if a reasonable person in the officer's position could have believed he had probable cause to arrest. *Id.* The district court held that a reasonable officer could have concluded that there was probable cause at the time that Quiles executed the probable cause affidavit based on the videotaped interview of Katie, Turner's affidavit, Houston's written and oral statements, and the CPS intake report. Quinn argues that a reasonable officer could not have concluded that there was probable cause based on the available evidence because the evidence cited by Quiles and the district court consisted solely of Katie's uncorroborated allegations of abuse; the allegations differed in detail when they were made to different individuals; the allegations were made by a teenager of unknown reliability during a time of great stress; Quiles did not attempt to get Quinn's side of the story; and Quiles never talked directly to Katie about the allegations.[3]

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[3] Quinn heavily relies on an affidavit from a purported police procedures expert stating that the available evidence was insufficient to give an objectively reasonable officer the level of proof necessary to conclude that Quinn had committed a crime. Quinn asserts that this affidavit is sufficient to raise a fact issue as to objective reasonableness. However, as noted by the district court, "this court has repeatedly held that objective reasonableness in a qualified immunity context is a question of law for the court to decide, not an issue of fact." *Atteberry v. Nocona Gen. Hosp.*, 430 F.3d 245, 256 (5th Cir.2005) (citations omitted). Quinn also asserts that Quiles himself conceded in his

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Although the facts known to Quiles at the time of the arrest did raise some questions about the Katie's reliability, which Quiles did not pursue, these questions were not so significant as to have made it objectively unreasonable for Quiles to have believed that probable cause existed in light of the detailed nature of Katie's allegations and the fact that Quiles did not possess evidence at the time that Katie may have had a motive to fabricate the allegations. *See Illinois v. Gates,* 462 U.S. 213, 234 (1983) ("[E]ven if we entertain some doubt as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed first-hand, entitles his tip to greater weight than might otherwise be the case."); *United States v. Phillips,* 727 F.2d 392, 399 (5th Cir.1984) (holding that detailed nature of informant's statement could compensate for uncertainty regarding the informant's veracity). The inconsistencies in Katie's descriptions of the timing of the abuse are relatively minor; her attempted suicide is not

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deposition that Quiles only had reasonable suspicion that Quinn had sexually assaulted his daughter, not probable cause, and that this is sufficient to raise a fact issue as to objective reasonableness. However, Quiles's statement in his deposition that he had reasonable suspicion referred to the period immediately after he first reviewed the CPS intake report, before he had reviewed the videotaped interview of Katie and received Turner's affidavit and Laurie Houston's written and oral statements. Quiles has consistently stated that he believed that he had probable cause at the time he executed the probable cause affidavit.

necessarily indicative of a lack of reliability, and may in fact be viewed as supporting her allegations of abuse; and shoplifting is a relatively minor crime that does not provide particularly strong evidence that a person is generally untrustworthy. Katie's vested interest in the child support dispute between Quinn and Laurie Houston raises a more serious question about her reliability, but there is no evidence that Quiles was aware of the dispute at the time of the arrest. There is no evidence that Quinn disregarded any exculpatory evidence at the time of the arrest. *See Wadkins v. Arnold,* 214 F.3d 535, 541 (4th Cir.2000) ("Although an officer may not disregard readily available exculpatory evidence of which he is aware, the failure to pursue a potentially exculpatory lead is not sufficient to negate probable cause."); *see also Evett v. DETNTFF,* 330 F.3d 681, 688 (5th Cir.2003) (quoting *Bigford v. Taylor,* 834 F.2d 1213, 1218 (5th Cir.1988)) ("[W]hile law enforcement personnel 'may rely on the totality of facts available to them in establishing probable cause, they also may not disregard facts tending to dissipate probable cause.'"). Further investigation into Katie's reliability may have been advisable as a matter of good police practices, but it was not objectively unreasonable to believe that probable cause existed even in the presence of some questions about Katie's reliability.[4]

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[4] Quiles asserts that he did not interview Quinn because Laurie Houston had informed him that Quinn was an alcoholic and a flight or suicide risk, and that he did not interview Katie

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Quinn argues that this case is similar to *Ripson v. Alles*, 21 F.3d 805 (8th Cir.1994), in which the court held that a police officer was not entitled to qualified immunity for his arrest of a parent who had allegedly sexually abused his two-year-old daughter. In *Ripson*, the officer arrested the child's father based on statements by the child's mother that the child had signs of redness in her genital area after visiting her father and claimed that her father had touched her inappropriately, as well as a statement by the mother's live-in boyfriend corroborating the mother's statement that the child claimed that her father had touched her inappropriately. *Id.* at 808. It was undisputed that, at the time of the arrest, the officer knew that there was no medical evidence of abuse and that the child's parents were involved in a custody dispute over the child. *Id.* The county attorney had also advised the officer to "keep investigating." *Id.* The court held that "[b]ased on all of the facts and circumstances within [the officer's] knowledge and of which he had reasonably trustworthy information at the time of the arrest, a reasonable officer could not have believed probable cause existed

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because he was concerned about causing her additional trauma. We do not find these explanations to be particularly satisfying, as they appear to be based on largely unsupported speculation, and there were presumably ways of interviewing Quinn and Katie while being sensitive to these concerns. However, we do not believe that it was objectively unreasonable to believe that probable cause existed without interviewing Quiles and Houston, regardless of the reason that Quiles did not interview them.

for the arrest of [the father] for sexually abusing his daughter." *Id.*

Quinn contends that this case is similar to *Ripson* in that there was no physical evidence of abuse or other evidence to corroborate the allegation of abuse, and asserts that the case for probable cause was actually stronger in *Ripson* because the allegations in that case were made contemporaneously with the abuse. There are clearly some factual similarities between this case and *Ripson,* but *Ripson* is distinguishable on a number of different grounds. First, the lack of corroborating physical evidence in this case is not as suspicious because the alleged abuse occurred a number of years prior to the investigation and Katie had been sexually active since the alleged abuse. Second, the allegations of abuse in this case were made by the alleged victim herself, not simply by her mother. Third, there is no evidence that Quiles was aware of the legal dispute between Quinn and Laurie Houston over child support, whereas in *Ripson* the officer was aware of the custody dispute. Considered as a whole, the facts in *Ripson* that tended to cast doubt on the veracity of the allegations of abuse and that were known to the officer at the time of the arrest appear more significant than those known to Quiles.

Quinn also argues that Quiles's belief that he fully disclosed all relevant facts and did not withhold exculpatory evidence from the magistrate judge that issued the warrant was not objectively reasonable. Quiles testified that he submitted all of the evidence

that he had collected in this case to the magistrate judge. Quinn has failed to present any competent summary judgment evidence that Quiles withheld relevant evidence from the magistrate judge; Quinn simply speculates that Quiles was aware of various facts bearing on Katie's credibility, including that she was seeing a psychiatrist and had attempted suicide on numerous occasions, because Laurie Houston was aware of them and she had been interviewed by Quiles. *See Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir.1994) (stating that unsubstantiated assertions, improbable inferences, and unsupported speculation are not competent summary judgment evidence). Based on the record evidence, Quiles's belief that he fully disclosed all relevant facts and did not withhold exculpatory evidence from the magistrate judge was objectively reasonable.[5]

We agree with the district court that Quinn failed to raise a fact issue as to the objective reasonableness of Quiles's belief that his conduct was lawful.

B. Official Immunity

Under Texas law, official immunity protects individual public officials from suit arising from

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[5] For the same reasons discussed above, Quiles did not violate Quinn's clearly established substantive due process rights. *See Chavez v. Martinez*, 538 U.S. 760, 775 (2003) (stating that conduct must be "conscience shocking" to violate substantive due process).

performance of (1) discretionary duties (2) in good faith (3) within the scope of their authority. *Ballantyne v. Champion Builders, Inc.*, 144 S.W.3d 417, 422 (Tex.2004) (citing *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex.1994)). Quinn concedes that Quiles was acting within the scope of his authority as a McKinney police officer when he applied for the arrest warrant, but argues that Quiles was not engaged in a discretionary function and that Quinn has raised a fact issue as to whether Quiles acted in good faith.

"If an action involves personal deliberation, decision and judgment, it is discretionary; actions which require obedience to orders or the performance of a duty to which the actor has no choice, are ministerial." *Chambers*, 883 S.W.2d at 654. "Ministerial acts are those for which the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Ballantyne*, 144 S.W.3d at 425 (citation and internal quotations omitted). The Texas Supreme Court has held that the actions of a police officer during a high-speed chase are discretionary because "[t]he decision to pursue a particular suspect will fundamentally involve the officer's discretion, because the officer must, in the first instance, elect whether to undertake pursuit," and that "[b]eyond the initial decision to engage in the chase, a high speed pursuit involves the officer's discretion on a number of levels, including, which route should be followed, at what speed, should back-up be called for,

and how closely should the fleeing vehicle be pursued." *Chambers,* 883 S.W.2d at 655. A number of Texas appellate courts have held that a police officer's investigation of a crime, determination of probable cause, and decision concerning if and when to make an arrest, are discretionary functions. *See, e.g., Kersey v. Wilson,* 69 S.W.3d 794, 799 (Tex.App. – Fort Worth 2002, no pet.); *Davis v. Klevenhagen,* 971 S.W.2d 111, 117-18 (Tex. App. – Houston [14th Dist.] 1998, no pet.); *Zess v. Funke,* 956 S.W.2d 92, 94 (Tex.App. – San Antonio 1997, no writ); *Antu v. Eddy,* 914 S.W.2d 166, 171 (Tex.App. – San Antonio 1995, no writ); *City of Hempstead v. Kmiec,* 902 S.W.2d 118, 121 (Tex.App. – Houston [1st Dist.] 1995, no writ); *Chapman v. Gonzalez,* 824 S.W.2d 685, 687 (Tex.App. – Houston [14th Dist.] 1992, writ denied); *Dent v. City of Dallas,* 729 S.W.2d 114, 116 (Tex.App. – Dallas 1986, writ refused n.r.e.). Quiles was clearly performing a discretionary function for the purposes of official immunity under Texas law when he investigated the alleged abuse and executed the probable cause affidavit.[6]

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[6] Quinn cites *Welch v. Milton,* 185 S.W.3d 586 (Tex.App. – Dallas 2006, pet. denied) for the proposition that, the immunity context, "[d]iscretionary acts are those related to determining what the policy of the governmental unit will be, but do not extend to the carrying out of the specifics of particular policies or exercise of 'professional' or 'occupational' discretion." *Id.* at 597 (citation and internal quotation marks omitted). That proposition is plainly at odds with the rule announced by the Texas Supreme Court that, in the official immunity context,

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To determine whether a public official acted in good faith, a court should consider whether a reasonably prudent official, under the same or similar circumstances, could have believed that his conduct was justified based on the information he possessed when the conduct occurred. *See Ballantyne,* 144 S.W.3d at 426. This test is derived substantially from the federal qualified immunity test. For the same reasons that we hold that Quiles held an objectively reasonable belief that his conduct was lawful, we hold that Quiles acted in good faith for the purposes of the official immunity inquiry.

We agree with the district court that Quiles was protected by official immunity.

C. Malicious Prosecution

Quinn asserts that the district court erred in holding that there is no freestanding federal cause of action for malicious prosecution. The district court's holding is clearly supported by this court's decision in *Castellano v. Fragozo,* 352 F.3d 939, 945 (5th Cir.2003) (holding that "no such freestanding constitutional right to be free from malicious prosecution exists").

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discretionary actions are those that involve personal deliberation, decision and judgment. *See Chambers,* 883 S.W.2d at 654.

D. Sovereign Immunity

Quinn asserts that the district court erred in holding that Quinn had failed to state a claim against the City for negligence because such a claim was barred by sovereign immunity. Under Texas law, the City of McKinney, as a unit of state government, is immune from suit and liability except to the extent that there is a waiver of immunity. *See Dallas Area Rapid Transit v. Whitley,* 104 S.W.3d 540, 542 (Tex.2003). As the district court held, Quinn's negligence allegations do not fall within the waiver of sovereign immunity for certain tort claims outlined in the Texas Tort Claims Act. *See Perez v. City of Dallas,* 180 S.W.3d 906, 910 (Tex.App. – Dallas 2005, no pet.) (citing Tex. Civ. Prac. & Rem.Code §§ 101.021, 101.022).

IV. Claims Relating to the Fifteen-Month Delay

A. Whether the Delay Violated Quinn's Constitutional Rights

Quinn asserts that the district court erred in holding that the fifteen-month delay did not violate his right to a speedy trial under the Sixth Amendment or his right to due process under the Fifth and Fourteenth Amendments.

1. Speedy Trial Claim

The district court held that the fifteen-month delay did not violate Quinn's right to a speedy trial under the Sixth Amendment on the grounds that pre-indictment delay does not give rise to a speedy trial claim. Quinn asserts that this was error because the protection afforded by the Sixth Amendment attaches upon arrest, not only indictment.

The Sixth Amendment protects the right of "the accused . . . to a speedy and public trial." U.S. Const. amend. VI. This protection "attaches at the time of arrest or indictment, whichever comes first." *Nelson v. Hargett,* 989 F.2d 847, 851 (5th Cir.1993); *see also United States v. MacDonald,* 456 U.S. 1, 7 (1982) (citing *Dillingham v. United States,* 423 U.S. 64 (1975)) ("[T]he period between arrest and indictment must be considered in evaluating a Speedy Trial Clause claim."). Speedy-trial claims are evaluated using a two-step process. At the first step, a court examines the length of the delay, which is "to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Barker v. Wingo,* 407 U.S. 514, 530 (1972). "A delay of less than one year will rarely qualify as 'presumptively prejudicial' for purposes of triggering the *Barker* inquiry." *Cowart v. Hargett,* 16 F.3d 642, 646 (5th Cir.1994). If the delay raises a presumption of prejudice, a court moves to the second step, at which "the length of the delay, the reason for the delay, and defendant's diligence in asserting his

or her rights is weighed against the prejudice to the defendant." *United States v. Bergfeld,* 280 F.3d 486, 488 (5th Cir.2002).

The only remedy for a violation of the Sixth Amendment right to a speedy trial is dismissal of any criminal charges. *See United States v. MacDonald,* 435 U.S. 850, 861 n.7 (1978) (citing *Strunk v. United States,* 412 U.S. 434 (1973)) ("[T]his Court has held dismissal of the indictment to be the proper remedy when the Sixth Amendment right to a speedy trial has been violated."). Here, because Quinn was never indicted, this court lacks the ability to grant any relief for the alleged Sixth Amendment violation. Quinn therefore lacks standing to assert his Sixth Amendment claim.[7] *See Vt. Agency of Natural Res. v. United States ex rel. Stevens,* 529 U.S. 765, 771 (2000) (stating that constitutional standing requires that the alleged injury be redressable by the courts, and that in order to demonstrate redressability, the plaintiff must show a "substantial likelihood that the

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[7] In any event, although the protection afforded by the Sixth Amendment attaches upon arrest, not only indictment, such that the period between arrest and indictment must be considered in evaluating a Speedy Trial Clause claim, preindictment delay alone cannot constitute a violation of the Sixth Amendment right to a speedy trial. There can be no violation of the Sixth Amendment right to a speedy trial in the absence of a criminal indictment. *See United States v. MacDonald,* 456 U.S. 1, 7 (1982) ("[N]o Sixth Amendment right to a speedy trial arises until charges are pending."); *see also United States v. Carlock,* 806 F.2d 535, 549 (5th Cir.1986) ("There is no sixth amendment right to a timely indictment.").

requested relief will remedy the alleged injury in fact" (citations and internal quotation marks omitted)); *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992) ("[I]t must be likely . . . that the injury will be redressed by a favorable decision." (citations and internal quotation marks omitted)).

The district court properly dismissed Quinn's Sixth Amendment speedy trial claim.

2. Due Process Claim

For a preindictment delay to violate the due process clause it must not only cause the accused substantial, actual prejudice, but the delay must also have been intentionally undertaken by the government for the purpose of gaining some tactical advantage over the accused in the contemplated prosecution, or for some other impermissible, bad faith purpose. *United States v. Crouch,* 84 F.3d 1497, 1514 (5th Cir.1996) (en banc). To establish prejudice, the defendant must offer more than mere speculation of lost witnesses, faded memories or misplaced documents; he must show an actual loss of evidence that would have aided the defense and that cannot be obtained from other sources. *United States v. Gulley,* 526 F.3d 809, 820 (5th Cir.2008) (citing *Crouch,* 84 F.3d at 1515). The due process prejudice standard is thus far more stringent than the speedy trial prejudice standard. This Court has underscored the difficulty of meeting this standard, noting that "it is difficult to imagine how a pretrial showing of

prejudice would not in almost all cases be to some significant extent speculative and potential rather than actual and substantial." *Crouch,* 84 F.3d at 1516. The burden is on the defendant to prove both prongs of the test. *United States v. Avants,* 367 F.3d 433, 441 (5th Cir.2004). In this case, Quinn has failed to allege the sort of prejudice required to state a claim for a violation of his due process rights as a result of preindictment delay.

B. Qualified Immunity

The district court held that the District Attorney Defendants in their individual capacities were entitled to qualified immunity from Quinn's federal claims on the grounds that Quinn had failed to allege facts that could establish a constitutional violation. As discussed above, we agree with the district court's analysis on this point. The District Attorney Defendants are entitled to qualified immunity with respect to Quinn's federal claims.

C. Prosecutorial Immunity

The district court held that any claims against the District Attorney Defendants in their individual capacities for their actions taken in the course of prosecuting Quinn are barred by absolute prosecutorial immunity. Quinn argues that a prosecutor's acts must occur at trial to fall within the ambit of prosecutorial immunity.

Prosecutors are absolutely immune from § 1983 suits in their individual capacities for actions that are within the scope of their prosecutorial duties. *Brooks v. George County, Miss.*, 84 F.3d 157, 168 (5th Cir.1996) (citing *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976)). Prosecutorial immunity has been extended to a prosecutor's actions in initiating, investigating, and pursuing a criminal prosecution. *McGruder v. Necaise*, 733 F.2d 1146, 1148 (5th Cir.1984); *Cook v. Houston Post*, 616 F.2d 791, 793 (5th Cir.1980). The decision to file or not file criminal charges is protected by prosecutorial immunity. *Oliver v. Collins*, 904 F.2d 278, 281 (5th Cir.1990). In this case, Quinn is suing the District Attorney Defendants for waiting fifteen months after he was arrested to seek an indictment. The alleged wrongful act concerns the decision of when and whether to file criminal charges, which clearly falls within the scope of the District Attorney Defendants' prosecutorial duties. *See Oliver*, 904 F.2d at 281; *McGruder*, 733 F.2d at 1148; *Cooke*, 616 F.2d at 793. Quinn's contention that prosecutors are only entitled to prosecutorial immunity when they are engaged in advocacy before a court has been clearly rejected by the Supreme Court. *See Van De Kamp v. Goldstein*, 129 S.Ct. 855, 861-65 (2009) (holding that prosecutorial immunity applied to acts related to establishment of office administrative procedures regarding how and when to make impeachment information available at a trial); *Imbler*, 424 U.S. at 431 n.33 ("We recognize that the duties of the prosecutor in his role as advocate for the State involve actions preliminary

to the initiation of a prosecution and actions apart from the courtroom.").

We agree with the district court that any claims against the District Attorney Defendants in their individual capacities for their actions taken in the course of prosecuting Quinn are barred by absolute prosecutorial immunity

D. Eleventh Amendment Immunity

Quinn argues that the district court erred by finding that the county prosecutors were protected by Eleventh Amendment immunity from being sued in their official capacities for their actions in handling the criminal case against Quinn because they are county, not state, officials. This circuit has stated on numerous occasions that district attorneys and assistant district attorneys in Texas are agents of the state when acting in their prosecutorial capacities. *See, e.g., Esteves v. Brock,* 106 F.3d 674, 678 (5th Cir.1997) (holding that a district attorney acted as a state official in using peremptory challenges during jury selection); *Krueger v. Reimer,* 66 F.3d 75, 77 (5th Cir.1995) (holding that the actions of a Texas district attorney within the scope of his prosecutorial function during a criminal proceeding do not constitute official policy for which a county can be held liable); *Echols v. Parker,* 909 F.2d 795, 801 (5th Cir.1990) (holding that a Texas district attorney is a state official when instituting criminal proceedings to enforce state law); *cf. Crane v. Texas,* 766 F.2d 193 (5th Cir.1985)

(holding that Texas district attorney acted as county official in setting county policy for the authorization of misdemeanor warrants). The District Attorney Defendants in this case were clearly acting in their capacities as prosecutors in determining whether and when to bring charges against Quinn. *See Echols*, 909 F.2d at 801. The District Attorney Defendants are protected by Eleventh Amendment immunity with respect to their actions in handling the criminal case against Quinn.

E. Injunctive Relief

Quinn appeals the district court's holding that he lacks standing to seek injunctive relief because he has failed to allege a likelihood of a future violation of his rights. Quinn asserts that he has standing to pursue an injunction against the County Defendants because they have asserted that they are capable of re-urging the child-abuse charges against Quinn at any time through 2015. He also asserts that he has third-party standing in light of the fact that new charges in an unrelated matter were filed against him in August 2006 and the County Defendants may "drag out" the prosecution of that case and cases against other accused persons.

To satisfy the standing requirement, a plaintiff seeking injunctive relief must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged conduct. *Armstrong v. Turner Indus., Inc.*, 141 F.3d

554, 563 (5th Cir.1998) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983)). The injury or threat of injury must be both real and immediate, not merely conjectural or hypothetical. *Id.* at 563 n.23 (citing *Lyons*, 461 U.S. at 102). The mere fact that the County Defendants have stated that they are capable of re-urging the child abuse charges does not constitute a direct threat, let alone an immediate one. *Cf. Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (holding that threats of prosecution were not imaginary or speculative when plaintiff had been twice warned to stop handbilling and was told by the police that if he handbilled again and disobeyed a warning to stop he would likely be prosecuted). Similarly, the asserted threat of Quinn's or another person's case being "dragged out" is vague, speculative, and not necessarily immediate. Quinn does not have standing to seek injunctive relief.

Accordingly, the judgment of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS SHERMAN DIVISION

JOHN GERARD QUINN,	§	
Plaintiff,	§	
	§	
v.	§	
JOHN ROACH, individually and in his official capacity as Collin County District Attorney, GAIL LEYKO, MANUEL GONZALES, CURTIS HOWARD, KRISTI TYLER, and MICHELLE VOIRIN, individually and in their official capacities as Collin County Assistant District Attorneys, JOSE QUILES, and FIVE JOHN DOE DEFENDANTS, individually and in their official capacities as McKinney, Texas police officers, LAURIE HOUSTON and KATIE QUINN, individually, COLLIN COUNTY, TEXAS and THE CITY OF MCKINNEY, TEXAS,	§	4:06cv120
Defendants.	§	

MEMORANDUM ADOPTING THE REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

(Filed Mar. 23, 2007)

Came on for consideration the above-referenced civil action, this court having heretofore ordered this

case be referred to the United States Magistrate Judge for all pretrial purposes.

The report of the United States Magistrate Judge, which contains proposed findings of fact and recommendations for the disposition of "Collin County Defendants' Motion to Dismiss" [Dkt. No. 64], has been presented for consideration.

The court having made a *de novo* review of the objections raised by Plaintiff thereto, is of the opinion that the findings and conclusions of the Magistrate Judge are correct, and the objections of Plaintiff are without merit. The court notes that on page 7 of the Magistrate Judge's Report the word "shown" should be replaced by the word "pled" in the following sentence: "The Court finds that Plaintiff has *shown* no such conduct that would subject the County to liability under Section 1983." Subject to this change, the court hereby adopts the findings and conclusions of the Magistrate Judge as the findings and conclusions of this court. It is, therefore,

ORDERED that the Magistrate Judge's Report is **ADOPTED** as the opinion of the Court.

SIGNED this 22nd day of March, 2007.

/s/ Richard A. Schell
RICHARD A. SCHELL
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS SHERMAN DIVISION

JOHN GERARD QUINN, Plaintiff, v. JOHN ROACH, individually and in his official capacity as Collin County District Attorney, GAIL LEYKO, MANUEL GONZALES, CURTIS HOWARD, KRISTI TYLER, and MICHELLE VOIRIN, individually and in their official capacities as Collin County Assistant District Attorneys, JOSE QUILES, and FIVE JOHN DOE DEFENDANTS, individually and in their official capacities as McKinney, Texas police officers, LAURIE HOUSTON and KATIE QUINN, individually, COLLIN COUNTY, TEXAS and THE CITY OF MCKINNEY, TEXAS, Defendants.	§ § § § § § § § § § § § § § § § § § § §	4:06cv120

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE GRANTING COLLIN COUNTY DEFENDANTS' MOTION TO DISMISS

(Filed Mar. 7, 2007)

On this day came on for consideration Collin County Defendants' Motion to Dismiss [Dkt. No. 64].

Having considered the motion, Plaintiff's response, Defendants' reply and Plaintiff's sur-reply, the Court is of the opinion the motion should be Granted.

Plaintiff John Quinn has filed this complaint against the Collin County District Attorney, John Roach, and a number of assistant district attorneys, police officers, individual defendants, and city and county organizations. Plaintiff asserts jurisdiction under Title 28 United States Code, Section 1331 and Title 42 United States Code, Section 1983. This is in essence a divorce and child custody case gone bad. Plaintiff's pleadings are at best a rambling diatribe against all defendants in this case. The Court will try to dissect what is really relevant from what is nothing more than a hostile attack on all defendants involved.

According to Plaintiff Quinn, Plaintiff and one of the defendants, Laurie Quinn Houston ("Houston"), divorced in 1991 after Plaintiff discovered she was having an extra-marital affair. Plaintiff was evidently awarded custody of the two minor children. Plaintiff alleges that one of the minor children went to live, at some point in time, with Houston. Plaintiff claims that Houston and his daughter were engaged in a questionable lifestyle. Plaintiff states that he was not aware of this lifestyle and made contributions to his daughter's support. Later on, Houston sued for additional child support. To avoid a fight, Plaintiff agreed to pay more money. At some point after the increase in child support, Plaintiff's financial circumstances changed and he and Houston went to mediation. The

parties apparently agreed to a reduction in the amount of child support. During all this time, Plaintiff claims that his daughter was suffering from mental problems and that she tried to commit suicide twice.

Plaintiff alleges that the "troubled minds" of his former wife and daughter concocted a scheme to either get more money from him or divert attention away from his daughter's troubles. His daughter allegedly informed her mother that Plaintiff had sexually molested her when she was 6 or 8 years old. Plaintiff claims that this was purely a fabrication. Houston seized on the opportunity and reported this to the authorities.

On or about July 14, 2004, Houston filed a complaint with the Denton County Child Protective Services alleging that Plaintiff had raped his daughter. Denton County did not interview or contact Plaintiff concerning the charges. He states that the affidavit of his daughter was fraught with lies. It appears that the Denton authorities did not proceed on the allegations. Undaunted, Houston then went to the McKinney police and filed a formal complaint. It appears that the officer investigating this complaint was Defendant Quiles. According to Plaintiff, Quiles made no investigation of the reported complaint. Plaintiff states that evidence even existed that no assault had occurred and that this was known by Quiles. Notwithstanding the complete lack of credible evidence, Plaintiff states that a warrant was issued

charging him with Aggravated Sexual Assault. Plaintiff claims that various members of the district attorney's office had to review the affidavit and pass on its merits. Further, Plaintiff complains that the affidavit does not list any of the exculpatory evidence existing at the time. In fact, Plaintiff states that the affidavit of Quiles is perjured.

In September, the Denton County authorities dropped the investigation and supposedly informed Quiles that they were unable to make a determination. Plaintiff was eventually no-billed, after a 15 month delay in getting this matter before a grand jury; and then only, after he had successfully filed a writ of habeas corpus.

Defendants Roach, Gonzales, Howard, Leyko, Tyler, and Voirin have filed a Motion to Dismiss under FRCP Rule 12(b)(6) [Dkt. 64]. The Court will refer to these defendants as the "DA Defendants."

Federal Rule of Civil Procedure 12(b)(6) Standard

When deciding a motion to dismiss under Rule 12(b)(6), the court must accept the plaintiff's factual allegations as true and resolve doubts as to the sufficiency of the claim in the plaintiff's favor. *Vulcan Materials Co. v. City of Tehuacana,* 238 F.3d 382, 387 (5th Cir.2001). Mere legal or constitutional are not sufficient. *Fee v. Herndon,* 900 F.2d 804, 807 (5th Cir.1990) *cert. den.* 498 U.S. 908 (1990).

Discussion

The gravamen of Plaintiff's complaint with these DA Defendants is that there was a 15 month delay from his arrest until the presentation of his case to the Grand Jury. No constitutional rights were violated in this delay. The Fifth Circuit has addressed this issue in other cases. To show some prejudice resulting from delay, the indictment must be barred by the statute of limitations and there must be a showing of prejudice. That prejudice must also be accompanied by a showing that the indictment or prosecution was delayed to gain a tactical advantage or for some other bad faith purpose. *U.S. v. Crouch,* 84 F.3d 1497 (5th Cir. 1996). In *Crouch,* the Court considered whether a seven-year delay was impermissible and found that it was not. Here, Plaintiff was no-billed within the limitations period. He states no claim for violation of his constitutional rights for the delay for which he complains. Since he was no-billed Plaintiff cannot show that any delay, if it was improper, caused actual, substantial prejudice to his defense. *U.S. v. Avants,* 367 F.3d 433 (5th Cir. 2004); *see also U.S. v. Jiminez,* 256 F.3d 330 (5th Cir. 2001) (finding that a 5 year pre-indictment delay did not violate defendant's due process rights). Moreover, the DA Defendants, when sued in their official capacities, are state officials, not local officials, for purposes of liability arising out of their prosecutorial decisions and are therefore are entitled to 11th Amendment Immunity. *Esteves v. Brock,* 106 F.3d 674 (5th Cir. 1997), *cert. denied* 522 U.S. 828 (1997). As a result,

the DA Defendants' motion to dismiss should be granted as to Plaintiff's claims asserted against them in their official capacities.

The DA Defendants also argue that they are entitled to qualified immunity from being sued in their individual capacities. The Court agrees. Qualified immunity shields government officials performing discretionary functions from individual liability for civil damages "insofar as their conduct does not violate clearly established rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L.Ed.2d 396 (1982); *Thompson v. Upshur County,* 245 F.3d 447, 456 (5th Cir. 2001). Qualified immunity serves to ensure that before a government official can be subjected to suit in her individual capacity, she is on notice that her conduct is unlawful. *Saucier v. Katz,* 533 U.S. 194, 206, 121 S. Ct. 2151, 2158, 150 L.Ed.2d 272 (2001). Whether a government official is shielded from suit by qualified immunity is determined by a two-step analysis. *Flores v. City of Palacios,* 381 F.3d 391, 395 (5th Cir. 2004); *see also McClendon v. City of Columbia,* 305 F.3d 314, 323 (5th Cir. 2002) (noting that when a defendant invokes qualified immunity, the burden is on the plaintiff to demonstrate the inapplicability of the defense). First, the court must determine whether the plaintiff's allegations, if true, establish a constitutional violation. *Hope v. Pelzer,* 536 U.S. 730, 736, 122 S. Ct. 2508, 2513, 153 L.Ed.2d 666 (2002). And when qualified immunity is asserted, Plaintiffs are required to specifically plead the facts

establishing the right to recover. *Shultea v. Wood*, 47 F.3d 1427, 1430 (5th Cir. 1995). Second, the court must determine whether a particular defendant's actions violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Hope*, 536 U.S. at 739.

For a constitutional right to be clearly established, its contours "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, . . . but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)) (internal citation omitted). As previously determined in this Report, Plaintiff has failed to allege facts that establish a constitutional violation, and DA Defendants are therefore protected by qualified immunity from being sued in their individual capacities.[1] Accordingly, the individual claims against the DA Defendants should be dismissed for failure to state a claim.

---

[1] Plaintiff also argues that he has a Sixth Amendment claim because the pre-indictment delay violated his right to a speedy trial. However, any pre-indictment delay does not give rise to a speedy trial claim; rather, it involves a due process claim. *United States v. McDonald*, 456 U.S. 1, 7 (1982). Further, Plaintiffs claim for Fourth Amendment violations does not involve the DA Defendants or Collin County.

The rest of Plaintiff's complaints center around the policies enacted or the failure to enact certain policies by the DA and his office. First, Section 1983 does not create supervisory liability based on *respondeat superior* or any other theory of vicarious liability. *Oliver v. Scott,* 276 F.3d 736, 742 (5th Cir. 2003). Therefore, any claims as to failure to properly train or supervise do not merit constitutional scrutiny. Any complaint about Roach or the other DA Defendants individually for their acts personally in the course of prosecuting Plaintiff are barred by the doctrine of absolute immunity. *Cousin v. Small,* 325 F.3d 627, 635 & n.11 (5th Cir. 2003). The Court does not agree with Plaintiff that such acts must occur at trial. Therefore, Plaintiff's claims for failure to train or supervise should be dismissed.

As to the liability of the County, the Fifth Circuit has established clear guidelines on what constitutes an "official policy" under Section 1983 for the purposes of municipal liability:

> 1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority; or
>
> 2. A persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled

> as to constitute a custom that fairly represents municipal policy.

Bennett v. City of Slidell, 735 F.2d 861, 862 (5th Cir.1984) (en banc) (per curiam), *cert. denied*, 472 U.S. 1016, 105 S.Ct. 3476, 87 L.Ed.2d 612 (1985). *Accord Johnson v. Deep E. Tex. Reg'l Narcotics Trafficking Task Force,* 379 F.3d 293, 309 (5th Cir.2004); *Cozzo v. Tangipahoa Parish Council-President Gov't,* 279 F.3d 273, 289 (5th Cir.2002). The Court finds that Plaintiff has shown no such conduct that would subject the County to liability under Section 1983.

Plaintiff also seeks permanent injunctive relief against the DA Defendants and Collin County. However, Plaintiff has failed to allege a likelihood of a future violation of his rights. As a result, Plaintiff lacks standing to seek injunctive relief against DA Defendants and Collin County. *See Armstrong v. Turner Industries, Inc.,* 141 F.3d 554, 563 (5th Cir. 1998) (determining that a party's failure to allege future injury precludes injunctive relief for lack of standing). Accordingly, Plaintiff's claim for injunctive relief against the DA Defendants and Collin County should be dismissed.

Conclusion

For the foregoing reasons, Collin County Defendants' Motion to Dismiss should be GRANTED, and Plaintiff's claims against Defendants John Roach, Gail Leyko, Manuel Gonzales, Curtis Howard, Kristi Tyler, Michelle Voirin and Collin County, Texas

should be dismissed for failure to state a claim upon which relief can be granted.

Recommendation

Based upon the foregoing, it is the Court's recommendation that Collin County Defendants' Motion to Dismiss should be [Dkt. No. 64] should be GRANTED.

Within ten (10) days after receipt of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations of the magistrate judge. 28 U.S.C.A. § 636(b)(1)(C).

Failure to file written objections to the proposed findings and recommendations contained in this report within ten days after service shall bar an aggrieved party from *de novo* review by the district court of the proposed findings and recommendations and from appellate review of factual findings accepted or adopted by the district court except on grounds of plain error or manifest injustice. *Thomas v. Arn,* 474 U.S. 140, 148 (1985); *Rodriguez v. Bowen,* 857 F.2d 275, 276-77 (5th Cir.1988).

SIGNED this 7th day of March, 2007.

/s/ Don D. Bush
DON D. BUSH
UNITED STATES
MAGISTRATE JUDGE

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

June 11, 2009

Mr. David Maland
Eastern District of Texas, Sherman
United States District Court
216 Federal Building
Sherman, TX 75090-0000

No. 08-40633, Quinn v. Roach, et al
USDC No. 4:06-CV-120

(Filed Jun. 15, 2009)

Enclosed for the Eastern District of Texas, Sherman only, is a copy of the judgment issued as the mandate.

Enclosed is a copy of the judgment issued as the mandate.

Record/original papers/exhibits are returned:

(2) Envelopes (SEALED)

Enclosed for the Eastern District of Texas, Sherman and counsel is the approved bill of costs.

The electronic copy of the record has been recycled.

CHARLES R. FULBRUGE III,
Clerk

By: /s/ Chris P. Descant
Chris P. Descant, Deputy Clerk
504-310-7704

cc: (letter only)
Mr. Thomas Phillip Brandt
Mr. Robert Jacob Davis
Ms. Laurie Houston
Mr. James A. Pikl
Ms. Katie Quinn
Mr. John Francis Roehm III
Honorable Richard A. Schell

P.S. to Judge Schell: A copy of the opinion was sent to your office via email the day it was filed.

Mandate Issued – MDT-1 (lag, tax, img)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-40633

JOHN QUINN,

Plaintiff-Appellant

v.

JOHN ROACH, individually and in his official capacity as Collin Co District Attorney; GAIL LEYKO, Individually and in official capacity; MANUEL GONZALES, individually and in official capacity as Collin Co Assistant District Attorney; CURTIS HOWARD, Individually and in official capacity as Collin Co Assistant District Attorney; KRISTI TYLER, Individually and in official capacity as Collin Co Assistant District Attorney; MICHELLE VOIRIN, Individually and in official capacity as Collin Co Assistant District Attorney; JOSE QUILES, Individually and in official capacity as McKinney Texas police officer; JOHN DOES, 1-5 Defendants, Individually and in their official capacity as McKinney Texas police officers; LAURIE HOUSTON; KATIE QUINN; COLLIN COUNTY TEXAS; CITY OF MCKINNEY,

Defendants-Appellees

Appeal from the United States District Court
for the Eastern District of Texas, Sherman

ON PETITION FOR REHEARING EN BANC

(Filed Jun. 3, 2009)

(Opinion ___, 5 Cir., ___, ___, F.3d ___)

Before, JONES, WIENER, and BENAVIDES, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Fortunato P. Benavides
United States Circuit Judge

Order on pet EB treat as pan reh-REHG6A

U.S. Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of

the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Constitution, Amendment XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Constitution, Amendment XIV (relevant part, section 1)

* * *

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

---

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Texas Code of Criminal Procedure, art. 32.01: Defendant in Custody and no Indictment Presented

When a defendant has been detained in custody or held to bail for his appearance to answer any criminal accusation, the prosecution, unless otherwise ordered by the court, for good cause shown, supported by affidavit, shall be dismissed and the bail discharged, if indictment or information be not presented against such defendant on or before the last day of the next term of the court which is held after his commitment

or admission to bail or on or before the 180th day after the date of commitment or admission to bail, whichever date is later.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

JOHN GERARD QUINN Plaintiff vs. JOHN ROACH, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS COLLIN COUNTY DISTRICT ATTORNEY, GAIL LEYKO, MANUEL GONZALES, CURTIS HOWARD, KRISTI TYLER, AND MICHELLE VOIRIN, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES AS COLLIN COUNTY ASSISTANT DISTRICT ATTORNEYS, JOSE QUILES AND FIVE JOHN DOE DEFENDANTS, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITY AS MCKINNEY, TEXAS POLICE OFFICERS, LAURIE HOUSTON AND KATIE QUINN, INDIVIDUALS, COLLIN COUNTY, TEXAS AND THE CITY OF MCKINNEY, TEXAS DEFENDANTS	)	CASE NO. 4:06CV120

****

ORAL DEPOSITION OF
JOSE QUILES
MARCH 2, 2007

****

[2] ORAL DEPOSITION OF JOSE QUILES, produced as a witness at the instance of the Plaintiff, and duly sworn, was taken in the above-styled and numbered cause on the 2nd day of March, 2007, from 10:11 a.m. to 12:03 p.m., before Tim Fails, CSR in and for the State of Texas, reported stenographically, at the offices of Fanning, Harper & Martinson, LLP, Two Energy Square, 4849 Greenville Avenue, Suite 1300, Dallas, Texas, pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto.

* * *

[19] Q. Do you understand that you have been sued and the allegations are that you obtained an arrest warrant for Mr. Quinn without probable cause?

A. Yes, sir.

Q. Do you understand that?

A. Yes, sir.

Q. And you understand what probable cause is, don't you?

A. I do.

Q. Explain to us in your best recitation of what probable cause means, what that term means.

A. It's a set of facts or apparent facts that would lead a reasonable person to believe that a crime is committed or is being committed, has been or is being committed.

Q. Okay. Do you understand about a term they use in police work called reasonable suspicion or – yeah, reasonable suspicion?

A. Yes, sir.

Q. Okay. What's the difference?

What is reasonable suspicion?

A. It's not probable cause.

Q. Okay. So those two – probable cause and reasonable suspicion are different things, right?

A. Yes.

[20] Q. Reasonable suspicion is a lesser standard of proof than probable cause, correct?

A. Correct.

Q. Okay. So on a continuum you've got nothing, no evidence; then you've got enough evidence for reasonable suspicion; then you have enough evidence for probable cause?

MR. ROEHM: Objection –

A. Correct.

MR. ROEHM: – form.

Q. (By Mr. Pikl) Is that how you understand it?

A. Correct.

Q Are you familiar with the written policies and procedures of the McKinney Police Department as they relate to your job?

A. Yes, sir.

(Exhibit 1 marked)

Q. (By Mr. Pikl) Let me show you Deposition Exhibit No. 1 which I have marked. And I will represent to you that that document is a fax cover sheet from Fanning, Harper & Martinson followed by approximately – actually not approximately – followed by 10 pages of records that your law firm sent to me in response to a request for all of the McKinney Police Department's policies and procedures relating to arrest and probable

* * *

[41] Q. State your name for the record. I don't know. What do you mean original question?

A. You were talking about exhibits.

Q. Yeah, my exhibit was – or my question was – and I was leading up to this question. I'll just ask it now or ask it again if I'm asking it twice.

On September 8th, 2004 when you swore out your probable cause affidavit the only written

physical evidence you had about this offense – alleged offense was Deposition Exhibit 3, which is an authorization for release; Deposition Exhibit 4, which was the information sheet from CAC; Deposition Exhibit 5, which was the intake report; Deposition Exhibit 6, which is Laurie Houston's written statement; and Deposition Exhibit No. 7, which is Nurse Turner's affidavit, correct?

A. Correct.

Q. And then there is also a document out there which is called your offense report, which is basically your notes, that also contains substantially the same information as your probable cause affidavit?

A. Yes, sir.

Q. Okay. Now, I want to go through those one at a time.

A. Right.

Q. Let me ask you this first.

* * *

[49] had happened to her. It didn't appear to me that Katie was lying, Katie was coached, she was making this up in any way.

MR. PIKL: Objection; form.

Q. (By Mr. Pikl) The question is what steps did you take, if any, to verify the truthfulness of the outcry?

A. Well, the steps I took was my training and experience, the outcry statement – I mean, the statement from the outcry witness; the statement and affidavit from the nurse at the hospital; the intake report from CPS which stated that the hospital staff believed because of her psychological reactions that this abuse might have occurred. Those are the steps I took to establish my probable cause to present before a magistrate.

MR. PIKL: Objection; nonresponsive.

Q. (By Mr. Pikl) The question is – well, let me ask you straight up. Did you take any steps other than looking at reports of this outcry to verify the truthfulness of Katie, whether she was a truthful person or not?

A. The steps that I have told you is the steps that I took in my investigation.

Q. Did you know when Katie made this outcry before you did your probably cause affidavit that when she first [50] made this outcry she had just been arrested that day for shoplifting?

A. Yes.

Q. Is shoplifting a crime of dishonesty or deceit?

A. Yes, sir.

Q. Okay. When you have a person making an outcry of any crime to you that has been recently accused of a crime of deceit do you automatically take their word for it?

A. No, sir.

Q. Okay. In this investigation, Mr. Quiles, the only thing you ever had, although you have multiple versions of it, was Katie's outcry, correct?

A. And the statement from the outcry witness.

Q. Who is the outcry witness?

A. Laurie Houston.

Q. Laurie Houston never said she ever witnessed this abuse, did she?

A. No, she did not witness the abuse.

Q. Right.

All Laurie Houston said was Katie told me, right?

A. Yes, sir.

Q. All Nurse Turner said was Katie told me, right?

A. Correct.

[51] Q. All the people at Denton's Family and Protective Services said was Katie told me, right?

A. Yes, sir.

(Cell phone ringing)

THE WITNESS: Sorry about that. I'll shut this off right now.

Q. (By Mr. Pikl) And the outcry itself found on the videotape is just Katie saying this happened, correct?

A. Correct.

Q. So the only evidence you had in your possession when you swore out this probable cause affidavit on September 8th of 2004 was Katie's outcry made to various people?

A. Correct.

Q. Knowing that Katie had just been arrested for a crime or deceit or dishonesty the day she made this outcry, did that color in any way your review that her report might be untruthful?

A. Well, given the fact that Katie Quinn attempted suicide – which I would not think a suicide attempt would have been made on a shoplifting charge – whereas her mother was talking to her about this particular incident that happened with her shoplifting, her attempted suicide and then her immediate outcry of sexual [52] abuse led me to believe that sexual abuse was the reason for her suicide attempt.

Q. Were you aware that Katie Quinn had tried to commit suicide twice before this?

A. No, sir.

Q. Did you bother to investigate or ask anybody about that?

A. I don't recall.

Q. Did you ask her mother, Hey, has Katie tried to commit suicide before?

A. I might have. I don't know.

Q. Okay. Did you ever ask Ms. Houston, Hey, does Katie have any history of mental disturbances or illnesses?

A. I don't know.

Q. Did you know that Katie was taking Zoloft and Seroquel during the summer of 2004?

A. She had taken –

MR. ROEHM: Objection; form.

Q. (By Mr. Pikl) Zoloft and Seroquel.

A. She had taken some medication that she mentioned in the videotape.

Q. Right.

A. If I look at the transcript I can tell you what that was.

* * *

[56] Q. So basically you just took Katie's word for all this that it happened, right?

A. Yes.

Q. Were you at all suspicious that this outcry didn't come out for between four and ten years after the offense supposedly occurred?

A. No, sir.

Q. Didn't bother you at all?

A. No, sir.

Q. Now, you have this case for approximately five weeks between the original report and the time you swear out your probable cause affidavit sometime between late July and the first week of September of '04, right?

During that five-week period –

THE REPORTER: You want an answer?

MR. PIKL: I'm sorry. Yes.

Q. (By Mr. Pikl) Answer yes or no. Sorry. You can't nod your head.

A. Your question again.

Q. You investigated this matter for about five weeks, from July 30th to September 8th of 2004, correct?

A. Yes.

Q. Now, why did you make the probable cause affidavit when you did? Why didn't you wait for the SANE examination to come back?

[57] A. I don't know. I had enough probable cause at the moment to swear out my affidavit.

Q. You believed that the information you had at the time was sufficient to establish probable cause?

A. Yes, sir.

Q. Okay. I have a question for you, then, because I'm a little confused about something in your affidavit.

In the affidavit you filed in this case on Page 3 of Exhibit 2, Paragraph 8 – Paragraph 7 and 8, excuse me –

A. Which one?

Q. Paragraph 7 and 8 of Exhibit 2, Page 3. It's your affidavit you filed in this case.

Are you there with me?

A. I'm there.

Q. Okay. On Paragraph 7 and 8 you talk about the four things you had in your possession: The videotape, the service notification, the Child Advocacy Center – I guess that's it, just those three things. Those three things established in your mind, according to Paragraph 8, that you had reasonable suspicion, correct?

A. Correct.

Q. Okay. So at that time when you had those three things, which is the outcry of Katie on the

videotape, the Child Advocacy Center intake report or information [58] sheet, and the services notification, that gave you reasonable suspicion, right?

A. Right.

Q. At that time, then, you had Katie's outcry, didn't you?

A. I had it with the videotape, yes.

Q. Right.

Okay. Between that date and September 8th of '04 when you swore out your probable cause affidavit, you never had anything else except the outcry, did you?

You already testified to that, right?

A. I had the affidavit from Joy Turner and I had the witness statement from –

Q. Okay.

A. – Laurie Houston.

Q. And we have already established, I think, that Laurie Houston's statement is nothing but a hearsay report of the outcry she heard from Katie, right?

MR. ROEHM: Objection; form.

A. It's an outcry witness statement.

Q. (By Mr. Pikl) Yeah.

A. First adult that Katie had mentioned this abuse to.

Q. Right.

But it's still just a repeat of what Katie [59] told her, right?

A. I beg your pardon?

Q. It's still a repeat of what Kate told her?

A. Katie told her, right.

Q. Right.

So it's not new evidence, it's just another person Katie told, right?

A. It is the first person Katie told.

Q. Okay. So we have Katie's outcry on the videotape; we have Laurie saying Katie made an outcry; we have the Denton County Child Advocacy Center saying Katie made an outcry. All of those things, that just led you to reasonable suspicion, didn't it?

A. Yes, sir.

Q. Right? Is that correct?

A. I had reasonable suspicion when I got the intact report as it states in my – Paragraph 7 and 8 of my affidavit.

Q. Okay. Well, actually Paragraph 7 says you also had the videotape, right?

A. I did have the videotape.

Q. Which contains Katie's taped outcry?

A. Yes, sir.

Q. So you had –

MR. ROEHM: I object to form. He doesn't [60] say he reviewed the videotape. I think you implied in your question that Paragraph 8 said he reviewed the videotape. That's what Paragraph 8 says.

MR. PIKL: If you interrupt again with a speaking objection we're going to go see Magistrate Bush. That's the last time that's going to happen. I have given you two shots at it now. Do not coach the witness.

MR. ROEHM: I'm not coaching the witness.

MR. PIKL: You are coaching the witness.

MR. ROEHM: You misrepresent what Paragraph 8 said.

MR. PIKL: Then you have an opportunity on cross-examination to bring that up.

Q. (By Mr. Pikl) Paragraph 7 and 8 of your affidavit in this case, Exhibit 2, you say you have three things in your possession: A videotape of the outcry, the CPS notification intake report, and the Denton County CAC information sheet, correct?

A. Correct.

Q. And those three things led you to have reasonable suspicion to start an investigation, correct?

A. Correct.

Q. Okay. After that date when you had this reasonable suspicion you never got any more evidence, did you, that this had happened other than just other repeats [61] of the outcry, correct?

A. Okay. I reviewed the videotape –

Q. Which is the outcry.

A. – got a statement from the outcry witness –

Q. Laurie Houston.

A. – got an affidavit from the nurse at the hospital –

Q. Right.

A. – who did an assessment on Ms. Quinn.

Q. And all Nurse Turner says is, Katie told me she was abused, right?

A. Uh-huh.

Q. Okay.

A. And that's what I had, uh-huh.

Q. Okay. So according to your affidavit, Mr. Quiles, this outcry creates reasonable suspicion and

the outcry also creates probable cause, is that your testimony?

A. After reviewing the videotape –

Q. Right?

A. – and after receiving the affidavit from a medical professional, that's correct.

Q. Okay. Can I see Nurse Turner's affidavit for a minute? I think it's No. 7.

A. (Witness complying.)

[62] Q. Exhibit No. 7, Nurse Turner's affidavit, is nothing but Nurse Turner saying Katie told me she was abused, correct?

A. I don't know what the procedure was for intake assessment at the Seay Center.

MR. PIKL: Objection; form. That's not what I asked.

Q. (By Mr. Pikl) I asked: Nurse Turner's affidavit doesn't say anything about this abuse except Katie told me, correct?

A. Correct.

Q. Okay. I think you testified before you didn't know why you swore out your warrant on the day you did.

Were there any emergency circumstances or exigent circumstances in your view why this case had

to be turned over to the magistrate on September 8th of '04?

MR. ROEHM: Objection; form.

A. When this was turned over to the magistrate I had enough probable cause to swear out my probable cause affidavit; therefore, the probable cause affidavit went to the magistrate.

Q. (By Mr. Pikl) So it wasn't that you were trying to hurry, it was just that you felt like you crossed the line to probable cause and so you were ready to go?

A. Yes, sir.

* * *

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

John Gerard Quinn,	§	
Plaintiff,	§	
	§	
vs.	§	
JOHN ROACH,	§	CIVIL ACTION NO.
individually and	§	4:06cv120
in his official capacity as	§	
Collin County District	§	
Attorney, et al.,	§	
Defendants.	§	

AFFIDAVIT OF MELVIN TUCKER

1. My name is Melvin Tucker and I was retained as a police procedures expert by counsel for John Gerard Quinn in this case. I was asked to analyze the facts of this case against a backdrop of the protocols followed by law enforcement officers when conducting investigations into allegations of criminal conduct in 2004 and to render my opinions as to whether the investigation protocols were followed by McKinney, Texas Police Officer Jose Quiles.

2. During the time period 1969-1979, I served as an FBI Agent and Chief of Police in Morristown, Tennessee; Hickory, North Carolina; and Asheville, North Carolina. From October 1979 until January 1994, I served as the Chief of Police in Tallahassee, Florida.

3. I served as a member and chairman of the North Carolina Criminal Justice Education and Training Council for three years and as a member and vice-chairman of the Florida Criminal Justice Standards and Training Commission for three years. In those positions, I had the responsibility for the development and approval of training programs, including the training curriculum for conducting criminal investigations, for all state and local law enforcement agencies in the respective states during that time period.

4. Throughout my law enforcement career I trained hundreds of law enforcement officers on the proper conduct of criminal investigations. I personally conducted investigations into criminal offenses and reviewed criminal investigations conducted by officers to determine whether or not the legal standards and recognized protocols were followed.

5. I have attended seminars, reviewed professional literature, and studied extensively the subject of criminal investigations and the levels of proof necessary to detain an individual for investigation (reasonable suspicion) or to arrest an individual for a crime (probable cause).

6. I served as an adjunct faculty member teaching Criminal Justice courses at Western Carolina University, Florida State University, Florida A&M University, Tallahassee Community College, Walters State Community and the University of Maine. I taught a criminal investigations course for several years while on the adjunct faculty at Florida A&M University.

7. I have been a certified law enforcement officer in Tennessee, North Carolina and Florida and am currently a Major with the Hamblen County, Tennessee Sheriff's Department. My current duties are to conduct training for members of the Hamblen County Sheriff's Department on high-risk operations and to develop and review department policy. I am also certified by the National Institute of Ethics (NIE) as a law enforcement ethics instructor and by the American Society for Law Enforcement Trainers (ASLET) as a law enforcement trainer.

8. I completed my bachelor's degree at the University of South Florida, Tampa, Florida and my master's degree at Appalachian State University, Boone, North Carolina. My complete curriculum vita is attached as Appendix A.

9. I understand that expert testimony must be objective and the expert must not be an advocate for any party involved in a lawsuit.

10. I understand that a witness's credibility is a matter for consideration by the trier of fact and not a proper consideration for expert testimony. I have assumed a set of facts to be true in this case strictly for the purpose of analysis. If asked to assume other facts, I will objectively render my opinions based upon that set of facts.

11. The terminology used in expressing my opinions in this affidavit may be legal terms, however, their use is not meant to invade the purview of the court. I use these same terms when I conduct training for police officers and supervisors on high-risk police operations and police civil

liability concerns. All terms used in my affidavit are commonly understood and used by law enforcement officers, law enforcement trainers and their supervisors.

12. An opinion expressed by me in this affidavit may state a conclusion which is also an ultimate issue in the case, however, I have made every effort to support those opinions with information about common practice and understanding in the law enforcement profession so as to assist the trier of fact in understanding the evidence or in determining a fact at issue in the case under consideration.

13. I have served as a consultant in more than 350 matters relating to police practices and have testified as an expert, in both state and federal courts, approximately 50 times. I have attached, as Appendix B, the list of cases I have provided deposition or trial testimony in during the past four years.

14. As is the protocol for any expert in a case like this, I reviewed documents relevant to this case and then developed a set of assumed facts, which I then analyzed against the standards, practices, principles and protocols recognized, relied upon and employed in the law enforcement profession at the time of this incident. The list of materials I reviewed is attached as Appendix C.

15. In conducting my analysis of this incident I assumed the facts as outlined in the attached Appendix D.

16. Because of my experience as a law enforcement officer and criminal investigator, my education and training in law enforcement, my knowledge of law enforcement protocols and standards, my analysis and study in the field of law enforcement and criminal investigations and through consulting professional literature, I am aware that, prior to 2004, law enforcement officers received instruction in basic training programs and were advised in training guides published by law enforcement professional associations that the primary objective of a preliminary investigation is to determine whether or not a crime has been committed. Although officers are instructed in basic training programs that an obviously reliable victim's statement is sometimes sufficient to establish probable cause, they also are instructed that the officer must go beyond simply accepting, without question, everything he is told. He must examine the accounts of the parties involved, evaluate their validity and gather any other available evidence in the case to determine if a crime has been committed.

    Officers are instructed that it is their duty to discover facts, to be curious and suspicious, and not to take anything for granted or to jump to conclusions. They are also told that they should not use "mere speculation" as a basis to conclude that a crime has occurred (see International Association of Chiefs of Police Training Key #260 entitled *Preliminary Investigations* attached as Appendix E).

17. Because of my experience as a law enforcement officer and criminal investigator, my education and training in law enforcement, my knowledge of law enforcement protocols and standards, my analysis and study in the field of law enforcement and criminal investigations and through consulting professional literature, I am aware that, prior to 2004, law enforcement officers were taught, in basic law enforcement training programs, that reasonable suspicion to detain a person for investigative purposes is a lower level of proof than that which an officer must have to arrest an individual. Officers are taught in basic law enforcement training programs that reasonable suspicion does not give an officer the authority to arrest and the officer must conduct a more thorough investigation to develop a level of proof that would cause him to reasonably believe (probable cause) that a crime had been committed, was being committed or was about to be committed before he can arrest an individual.

18. Law enforcement training documents, published by law enforcement professional associations prior to 2004, advised officers that the determination of probable cause (that level of proof that would cause the officer to reasonably believe that a crime had been committed) is a "balance sheet process." This "balance sheet process" simply means that as an officer conducts a preliminary investigation, he accumulates information that either supports probable cause (incriminating information) or undermines probable cause (exculpatory information). The officer then makes a decision as to whether or not

probable cause exists by balancing the incriminating facts against the exculpatory facts. (see International Association of Chiefs of Police Training Key #136 entitled *Probable Cause* attached as Appendix F).

19. Because of my experience as a law enforcement officer and criminal investigator, my education and training in law enforcement, my knowledge of law enforcement protocols and standards, my analysis and study in the field of law enforcement and criminal investigations and through consulting professional literature, I am aware that, prior to 2004, law enforcement officers were taught in basic law enforcement training programs that, when seeking an arrest warrant, an officer has a ministerial responsibility to make the judicial officer aware of all incriminating and exculpatory information he has learned about through his preliminary investigation so that the judicial officer can make an informed decision as to the existence of sufficient evidence to support the issuance of an arrest warrant.

20. Because of my experience as a law enforcement officer and criminal investigator, my education and training in law enforcement, my knowledge of law enforcement protocols and standards, my analysis and study in the field of law enforcement and criminal investigations and through consulting professional literature, I am aware that since the late 1980's law enforcement officers have also been receiving instruction in basic training programs on the meaning of the phrase "objective reasonableness." Officers have been told that, when an evaluation of their

actions is undertaken to determine whether they were "objectively reasonable" the question asked will be whether other officers, if confronted with the same or similar circumstances, would have responded in the same manner. If the answer is yes, then their actions may be deemed "objectively reasonable."

21. After a review of the facts of this case, I hold the opinion, to a reasonable degree of professional certainty, that Detective Jose Quiles preliminary investigation into the allegation made by Katie Quinn that her father, John Quinn, had sexually abused her four to eight years earlier, was inadequate and fell below the standard of care for the proper conduct of a preliminary investigation because Quiles failed to conduct a sufficient investigation to determine whether a crime, in fact, had occurred. My opinion is based upon the following:

    (1) Quiles failed to interview Katie Quinn even though she had made inconsistent statements to several persons and made the allegations four to eight years after the alleged acts were supposed to have occurred;

    (2) Katie Quinn made her allegation after being arrested for shoplifting which may have motivated her to make the allegation to take attention away from her and place it elsewhere;

    (3) Quiles failed to interview the accused father before arresting him to determine if he had any proof to counter her allegations;

(4) Quiles failed to interview other persons who may have been able to advise him as to Katie Quinn's credibility; and

(5) Quiles "speculated" as to what the SANE Report (Sexual Assault Nurse Examiner Report) results would show (see ¶ 19 Quiles Affidavit).

22. I hold the opinion, to a reasonable degree of professional certainty, that Detective Jose Quiles had a ministerial duty to conduct a thorough and complete preliminary investigation into the allegation made by Katie Quinn to determine whether the allegation was supported by any evidence to support probable cause believe that a crime had occurred before arresting John Quinn (see International Association of Chiefs of Police Training Key #260 entitled *Preliminary investigations* attached as Appendix E).

Even though no exigent circumstances existed that required Detective Quiles to move rapidly to arrest John Quinn (other than a statement from Laurie Houston that Quinn was a flight risk and suicidal), Quiles arrested John Quinn knowing that a CPS report would be forthcoming which could be either exculpatory or incriminating in nature.

Detective Jose Quiles was also aware of, but apparently ignored, the fact that the Colony [sic] Police Department had filed no charges relating to Katie's allegations and he failed to interview John Quinn, Katie's father, or Bryan Quinn, Katie's brother, about whether or not Katie was a reliable and truthful person or whether either of

them knew of prior statements of sexual abuse, other evidence of alleged crimes, or whether Katie may have had ulterior motives for making allegations that she had been sexually abused. Detective Quiles also knew that Katie's allegations were made at a time when Katie had been arrested for shoplifting and may have had a reason to lie to deflect attention away from her own crime and may also explain why her versions of the facts were inconsistent.

The only evidence Detective Quiles relied upon to arrest John Quinn was the allegation made by Katie that was not independently corroborated by any other evidence, was made by a teenager of unknown reliability during a time of great personal stress and the versions of the allegations varied in detail. This was insufficient to give an objectively reasonable officer the level of proof necessary to conclude that probable cause existed that John Quinn had committed a crime. Detective Quiles ignored exculpatory information such as the Texas Department of Family and Protective Services investigation into the allegations made by Katie which concluded, on September 10, 2004, that there was insufficient proof to make a determination as to whether the allegations were true (see Texas Department of Family and Protective Services CPS Investigation Reading Tool pages 1 and 2). CPS concluded, following its investigation, that Katie could provide very little detail about the alleged sexual assaults (see page 2 of CPS Structured Narrative Report), her SANE examination was reported as normal (see page 3 of CPS Structured Narrative Report), and Mr.

Curtis Howard, Collin County DA Office, was concerned about the inconsistent statements Katie had made to him, the CPS case worker, and SANE (see page 3 of CPS Structured Narrative Report), the CPS worker was concerned as to why Katie did not make an outcry when she alleged the acts occurred (see page 4 of CPS Structured Narrative Report), and the SANE exam found no old trauma (see page 4 of CPS Structured Narrative Report).

Because their [sic] was no medical evidence to support the contention that Katie had been sexually abused and her testimony evidence regarding the alleged events was inconsistent., Detective Quiles could not have reasonably believed that probable cause existed for the arrest of John Quinn.

23. After a review of the facts of this case, I hold the opinion, to a reasonable degree of professional certainty, that the arrest of John Gerard Quinn by Detective Quiles on September 12, 2004, for aggravated sexual assault of a child, was not objectively reasonable because the arrest was not based upon sufficient proof to establish arguable probable cause to believe that John Gerard Quinn had committed a crime, and no reasonable officer would have believed that probable cause existed for the arrest of John Gerard Quinn or sought an arrest warrant without further investigation.

In this case Detective Quiles had both incriminating and exculpatory information to use in the "balance sheet process" before making a probable

cause determination. However, he ignored the information he was aware of which would have been exculpatory in nature or would go against the credibility of Katie Quinn including (1) the inconsistencies in the statements made by Katie Quinn, (2) that a child support battle was on-going between Katie's mother, Laurie Houston and her father John Quinn, (3) that Katie Quinn had been arrested for shoplifting just prior to her making the allegation of abuse, (4) that Katie had attempted suicide in the past and was not mentally stable, and (5) that Katie was under a doctor's care for bipolar disorder and schizophrenia.

The totality of facts and circumstances used by detective Jose Quiles to obtain a warrant to arrest John Quinn was limited solely to a statement made by Katie alleging sexual abuse by her father, John Quinn, and repeated or reported by others (through a Notification to Law Enforcement Agency Report, from the Texas Department of Family and Protection Services, a videotape of Katie making the allegations to Dawn Todd at the Denton County Children's Advocacy Center, an affidavit from nurse Joy Turner, who interviewed Katie Quinn at the Seay Behavioral Health Center, stating that Katie had made the allegations to her, and the statement of Laurie Houston, Katie's mother, that Katie had made the allegations to her).

24. After a review of the facts of this case, I hold the opinion, to a reasonable degree of professional certainty, that Detective Jose Quiles left out clearly critical facts when he presented his

Affidavit of Probable Cause to the judicial officer on September 9, 2004 for the authority to arrest John Quinn even though officers are instructed in basic law enforcement training programs that they have a ministerial duty to inform magistrates of both incriminating and exculpatory information known to them when applying for an arrest warrant and all reasonable police officers do so.

Detective Quiles was aware, prior to presenting his affidavit to the magistrate, of the exculpatory evidence which existed in this case and even cited the CPS Case Report and the RN's affidavit in his Probable Cause Affidavit (see Probable Cause Affidavit of Quiles sworn to on September 8, 2004 and presented to the magistrate on September 9, 2011). However, he did not make the magistrate aware of the findings of the RN or the CPS investigation and failed to advise the magistrate that Laurie Houston and John Quinn were divorced and involved in a dispute over child support payments when these allegations were made. He also failed to tell the magistrate about the suspicious circumstances under which Katie made her allegations or that several other people who reported Katie's allegations reported several significantly different versions of her story.

Date: 3-19-07 /s/ Melvin Tucker
Melvin Tucker

STATE OF TENNESSEE

HAMBLEN COUNTY

Personally appeared before me the above-named Melvin Tucker and made oath that the foregoing statements made by him are true and correct to his own personal knowledge.

/s/ [Illegible] Johnnson
Notary Public

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No. 09-252

Supreme Court, U.S.
FILED
NOV 16 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JOHN QUINN,

Petitioner,

v.

JOHN ROACH, individually and in his official capacity as Collin County District Attorney, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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November 16, 2009

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QUESTIONS PRESENTED

1. Whether Petitioner has presented compelling reasons to grant the Petition, where the Fifth Circuit's Opinion holding that the District Attorney Respondents were entitled to prosecutorial immunity for actions relating to their decision of whether and when to file criminal charges does not conflict with a decision of this Court or another circuit court of appeals.

2. Whether Petitioner has presented compelling reasons to grant the Petition, where the Fifth Circuit's Opinion holding that the District Attorney Respondents were entitled to prosecutorial immunity based upon claims that they violated a state procedural statute governing the time in which an indictment is presented to the grand jury does not conflict with a decision of this Court or another circuit court of appeals.

3. Whether Petitioner has presented compelling reasons to grant the Petition, where the Fifth Circuit's Opinion holding that the District Attorney Respondents were entitled to prosecutorial immunity from the Petitioner's claims against them in their individual capacities and Eleventh Amendment Immunity from the Petitioner's claims against them in their official capacities does not conflict with a decision of this Court or another circuit court of appeals.

4. Whether Petitioner has presented compelling reasons to grant the Petition, where the Fifth Circuit's Opinion holding that the Petitioner was not entitled to money damages under 42 U.S.C.

§ 1983 for a violation of his speedy trial rights under the Sixth Amendment does not conflict with a decision of this Court or another circuit court of appeals.

LIST OF PARTIES

Petitioner

JOHN QUINN

Respondents

JOHN ROACH, individually and in his official capacity as Collin County District Attorney; GAIL LEYKO, individually and in her official capacity as Collin County Assistant District Attorney; MANUEL GONZALES, individually and in his official capacity as Collin County Assistant District Attorney; CURTIS HOWARD, individually and in his official capacity as Collin County Assistant District Attorney, KRISTI TYLER, individually and in her official capacity as Collin County Assistant District Attorney, MICHELE VOIRIN, individually and in her official capacity as Collin County Assistant District Attorney; JOSE QUILES, individually and in his official capacity as McKnney Texas police officer; COLLIN COUNTY, TEXAS; and CITY OF McKINNEY

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The opinion of the Court of Appeals (Petitioner's App. 1-29) is unreported but available at 326 Fed. App'x 280. The Opinion of the District Court (Petitioner's App. 30-31) is unreported but available at 2007 WL 922233. The Report & Recommendation of the United States Magistrate Judge (Petitioner's App. 32-41) is unreported but available at 2007 WL 737523.

STATEMENT OF THE CASE

A. Introduction

Put simply, Petitioner has presented no "compelling reasons" for this Court to grant his Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit ("Petition"). *See* Sup. Ct. R. 10. Specifically, Petitioner has failed to demonstrate that the Fifth Circuit's May 4, 2009 Opinion ("Opinion") rendered in the case at bar is in conflict with a decision of this Court or another court of appeals, or that the Fifth Circuit has decided an important federal question that has not been settled by this Court. *See id.* As a result, the Petition should be denied.

Throughout his Petition, the Petitioner seeks to portray the underlying Opinion as setting the Fifth Circuit wholly apart from the jurisprudence propounded by its sister courts and this Court. For example, the Petitioner repeatedly characterizes the Opinion as "in direct conflict with nearly every other circuit," representing to this Court that a significant circuit conflict exists. Petition at 14. However, to the contrary, the Opinion is consistent with the long-standing protections provided by this Court and the

lower federal courts to prosecutors engaged in their performance of determining how, whether, when and against whom they should bring criminal charges. As a result, this Court's intervention – merely to reaffirm same – is unwarranted.

Ultimately, the Petitioner's argument is that the Fifth Circuit should have created an exception to the doctrine of prosecutorial immunity (and its attendant immunities as recognized by this Court) to provide the Plaintiff a cause of action under 42 U.S.C.A. § 1983 (West 2003) for money damages against the District Attorney of Collin County, Texas and several of his assistants. This exception the Petitioner seeks to create in the well-settled doctrine of prosecutorial immunity stems from his disagreement with certain prosecutorial decisions (i.e., when his case was to be presented to the grand jury) made by the District Attorney's Office, even though the charges against him were ultimately dismissed when Petitioner was "'no-billed[,]'" and he now seeks to impose financial penalty upon these prosecutors on the order of $28,490,000.00 in compensatory damages and $25,000,000.00 in punitive damages. Petition at 4; Respondents' App. at 42b-43b. But both the district court and the Fifth Circuit declined to break this Court's well-settled precedents and create a new claim for money damages against prosecutors for making these decisions.

Much of the purported conflict the Petitioner pleas exists comes from a blatant misreading of the Fifth Circuit's holdings in the underlying Opinion. As will be set forth in further detail, it is this repeated misreading of the Fifth Circuit's analysis which gives rise to many of the unnecessary questions that the Petitioner seeks to put before this Court. Because the

Petitioner is simply incorrect that any of the Fifth Circuit's analysis would render it an outlier among the federal circuits, this Court should certainly use its time more judiciously and deal with other actions where true disputes of federal questions are implicated.

Petitioner has failed to carry his burden to establish that there is any compelling reason for this Court to grant the Petition. Accordingly, the Petition should be denied.

B. Summary of the Underlying Facts and Proceedings.

As was noted by the Fifth Circuit, the claims originally asserted by the Petitioner can be divided into two groups: (1) those dealing with his initial arrest; and (2) those dealing with the subsequent fifteen-month delay in the presentation of his case to the grand jury. Petitioner's App. at 2. The Petitioner's claims against Collin County, the Collin County District Attorney, and the assistant district attorneys (collectively the "County Respondents")[1] relate only to the fifteen-month delay in the presentation of the case to the grand jury, and, as a result thereof, only issues relating to the County Respondents will be addressed in this Response. Petitioner's App. at 3. Petitioner brought suit against the County Respondents under, *inter alia*, 42 U.S.C. § 1983 seeking money damages

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[1] Herein, these Respondents may also use the term the "District Attorney Respondents" in reference to the Collin County District Attorney and the assistant district attorneys, without Collin County.

and injunctive relief against the County Respondents. Petitioner's App. at 3.

Petitioner was arrested on September 12, 2004 by the McKinney Police Department and charged with the felony criminal offense of aggravated sexual assault of a child, his own daughter. Petitioner's App. at 7. The County Respondents were not involved in any manner with the investigation of the Petitioner or his arrest, and there are no allegations of same. Petitioner's App. at 3; *see generally* Respondents' App. at 1b-54b. Petitioner was subsequently released on bail. Petitioner's App. at 7. Over one year having passed since his arrest, Petitioner filed a writ of habeas corpus in state court seeking release from bail because of delay, and on January 6, 2006 a state district judge granted the writ and issued an order of dismissal. *Id.* On January 10, 2006, the District Attorney Respondents presented the matter to the Collin County Grand Jury, which "no billed" the Petitioner. *Id.*

The Petitioner subsequently filed suit against the County Respondents, his Complaint averring both federal and state law claims. Concerning his relevant federal claims against the County Respondents, the Petitioner contended that they had purportedly violated his constitutional "right to a speedy trial as protected by the Sixth Amendment" and his "rights to substantive and procedural due process and equal protection of the laws protected by the Fifth and Fourteenth Amendments."[2] Then, solely against the

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[2] In his Petition, Petitioner appears to limit his claims for review by this Court to those associated with his Sixth Amendment

District Attorney Respondents, the Petitioner averred that they "violated clearly-established statutory law prohibiting delays in prosecution (Tex. Code Crim. Proc. § 32.01) and relating to their duties as prosecutors (Tex. Code Crim. Proc. § 2.01)." Respondents' App. at 42b. With respect to his federal claims against Collin County itself, the Petitioner alleged the county had either (1) improper customs, policies, and practices, (2) "no policies," or (3) "policies routinely ignored."[3] Respondents' App. at 31b-33b.

The County Respondents answered and asserted various defenses including, *inter alia*, Prosecutorial Immunity, Official Immunity, Qualified Immunity, Sovereign Immunity, and Eleventh Amendment Immunity. Collin County also denied that the Petitioner was deprived of a constitutionally protected right by any custom, policy or practice of the county. After answering, the County Respondents filed a Motion to Dismiss the Petitioner's claims, which was granted in full by the District Court, adopting the Report and Recommendations of the United States

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speedy trial right, and these Respondents specifically aver that Petitioner has so limited the scope of this Court's review to his claims arising under the Sixth Amendment. *See Albright v. Oliver*, 510 U.S. 266, 275 (1994) (plurality opinion) ("We express no view as to whether petitioner's claim would succeed under the Fourth Amendment, since he has not presented that question in his petition for certiorari.").

[3] Again, with regard to the specific claims against Collin County, the Petitioner does not appear to seek certiorari on any of the Fifth Circuit's holdings regarding these *Monell* claims against it, and these Respondents specifically aver that Petitioner has so limited the scope of this Court's review to include no such claims. *See generally* Petition. *See Albright*, 510 U.S. at 275.

Magistrate Judge.[4] Petitioner's App. at 32-41, 30-31. The District Court's holding was subsequently certified for appeal and Petitioner appealed same. The Fifth Circuit, on May 4, 2009, affirmed the District Court's dismissal of the County Respondents. Petitioner's App. at 1-29. Specifically, the District Attorney Respondents were dismissed on immunity grounds and Collin County on the grounds that the District Attorney Respondents, the only alleged actors constituting the foundation of the Petitioner's claims against the county, were state rather than county officials while engaged in their prosecutorial functions. Petitioner's App. at 21-29.

REASONS FOR DENYING THE PETITION

I.
No Divergence In The Application of Prosecutorial Immunity Exists In The Opinion

A. The Fifth Circuit's Opinion Is Consistent With This Court's Precedents and the Holdings of Its Sister Courts of Appeal With Regard to The Application of Prosecutorial Immunity

In his Petition, the Petitioner states that "if Quinn's case had been brought in any circuit court other than the Fifth, the outcome below would have been the opposite of what occurred." Petition at 22. The Petitioner is flatly incorrect, and the Fifth Circuit properly followed this Court's precedents, consistent

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[4] The District Court corrected a single word in the Report and Recommendation's dismissal of Collin County. *See* Petitioner's App. at 30-31.

with the well-settled law of its sister courts, in rendering the Opinion below.

As this Court has previously recognized, though absolute prosecutorial immunity reflects a "a balance" of "evils[,]" "it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." *Gregorie v. Biddle*, 177 F.2d 579, 581 (2nd Cir. 1949) (Hand, C.J.) (quoted in *Van de Kamp v. Goldstein*, 129 S.Ct. 855, 859 (2009)). In arguing that the Fifth Circuit's holding was inconsistent with this Court's precedents and the holdings of the other circuit courts, the Petitioner concedes, as he must, that prosecutors, such as the District Attorney Respondents, are entitled to absolute prosecutorial immunity with regard to their actions which are "intimately associated with the judicial phase of the criminal process." Petition at 22 (quoting *Imber v. Pachtman*, 424 U.S. 409, 430 (1976)). However, the Petitioner fails to recognize that the decision by the District Attorney Respondents of whether and when to dismiss charges or present a case to the grand jury falls specifically within the scope of the immunity provided by *Imbler*. Specifically, the Petitioner simply fails to acknowledge that in *Imbler* this Court held that

> [w]e recognize that the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions *apart from the courtroom*. A prosecuting attorney is required constantly, in the course of his duty as such, to make decisions on a wide variety of sensitive issues. These include questions of *whether to*

> *present a case to a grand jury, whether to file an information, whether and when to prosecute, whether to dismiss an indictment against particular defendants,* which witnesses to call, and what other evidence to present.

Imbler, 424 U.S. at 430 n.33 (emphasis added). This Court further reasoned that without absolute immunity, the threat of Section 1983 liability would undermine the performance of a prosecutor's duty to "exercise his best judgment [] in deciding which suits to bring and in conducting them in court." *Id.* at 424-425. This Court's subsequent case law, as well as the well-settled law of the circuit courts, has consistently reaffirmed this principle.

In this regard, as recently as its last term this Court reaffirmed these principles first espoused in *Imbler*, as well as the subsequent distinctions espoused by this Court and the various circuit courts. *Van de Kamp v. Goldstein*, 129 S.Ct. 855, 861 (2009). As noted in *Goldstein*, absolute prosecutorial immunity may not apply when "a prosecutor is not acting as 'an officer of the court,' but is instead engaged in other tasks, say, investigative or administrative tasks." *Id.*; *see also* Petitioner's App. at 26-27. Further, it is well settled among the circuit courts of appeal that prosecutors are not entitled to absolute prosecutorial immunity when claims asserted against them relate to investigative functions or mere administrative actions. *See, e.g.*, *Brooks v. Rothe*, 577 F.3d 701, 712 (6th Cir. 2009) (quoting *Cooper v. Parish*, 203 F.3d 937, 946-47 (6th Cir. 2000)); *Cousins v. Lockyer*, 568 F.3d 1063, 1068 (9th Cir. 2009) (quoting *Van de Kamp*, 129 S.Ct. at 861); *Mangiafico v. Blumenthal*, 471 F.3d 391, 396 (2nd Cir. 2006). The Petitioner, however, fails to grasp

this distinction. Specifically, he argues the decisions of whether to present a case to a grand jury and whether to dismiss a criminal charge are decisions which fall outside a prosecutor's "advocatory" function and are, instead, ministerial or administrative acts for which absolute prosecutorial immunity does not apply. *See* Petition at pp. 23-24. This is, frankly, a clear misstatement of this Court's precedents and well-settled law.

In arguing this point, the Petitioner not only ignores the clear holdings of *Imbler* and *Goldstein* but wholly misconstrues the Fifth Circuit's citation of *Goldstein* in the Opinion below. In a footnote, the Petitioner asserts that the result of the Fifth Circuit's Opinion would be that "*all* actions taken by prosecutors, even those not involving advocacy functions, now qualify for absolute immunity." Petition at 23 n.14 (emphasis in original). However, the Fifth Circuit's Opinion objectively does not state this proposition. Specifically, the Fifth Circuit cited to *Goldstein* only once when discussing the nature of the Petitioner's claims:

> [i]n this case, Quinn is suing the District Attorney Defendants for waiting fifteen months after he was arrested to seek an indictment. The alleged wrongful act concerns the decision of when and whether to file criminal charges, which clearly falls within the scope of the District Attorney Defendants' prosecutorial duties. Quinn's contention that prosecutors are only entitled to prosecutorial immunity when they are engaged in advocacy *before a court* has been clearly rejected by the Supreme Court. *See Van de Kamp v. Goldstein*, --- U.S. ----, 129 S.Ct.

> 855, 861-65, 172 L.Ed.2d 706 (2009) (holding that prosecutorial immunity applied to acts related to establishment of office administrative procedures regarding how and when to make impeachment information available at a trial); *Imbler*, 424 U.S. at 431 n. 33, 96 S.Ct. 984 ("We recognize that the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom.").

Petitioner's App. at 26-27 (emphasis added) (other internal citations omitted). It is clear from the Fifth Circuit's discussion that its holding only rejects the Petitioner's argument, made before the Fifth Circuit, that prosecutorial immunity extends only to actual courtroom advocacy, not that "*all* actions taken by prosecutors . . . now qualify for absolute immunity." Petition at 23 n.14. In fact, in *Goldstein* this Court did extend absolute prosecutorial immunity to "a prosecutor engaged [] in certain administrative activities" which are "directly connected with the conduct of a trial."[5] *Goldstein*, 129 S.Ct. at 861-62. This comports exactly with the "functional" approach to prosecutorial immunity approved by this Court, used

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[5] As this Court recognized, such administrative procedures (specifically, the training of assistant district attorneys and supervision of the district attorney's office's information system) are distinct from other administrative duties unrelated to the prosecutorial function, such as "workplace hiring, payroll administration, the maintenance of physical facilities, and the like." *Goldstein*, 129 S.Ct. at 862.

by the circuit courts,[6] and, surprisingly, urged by the Petitioner.[7] Petition at 23; *Goldstein*, 129 S.Ct. at 861 (citing *Burns v. Reed*, 500 U.S. 478, 486 (1991); *Kalina v. Fletcher*, 522 U.S. 118, 127, 130 (1997)).[8] As a result,

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[6] In this regard, the Petitioner cites to *Atherton v. District of Columbia Office of Mayor*, 567 F.3d 672 (D.C. Cir. 2009) as an example of a case where *Goldstein* was properly interpreted. Petition at 23. However, *Atherton* is a wholly different scenario and was rightly distinguished from *Goldstein* by the D.C. Circuit. Specifically, it is undisputed that in this case, the Petitioner asserts claims based upon his allegations that the District Attorney Respondents took improper action relating to criminal charges pending against him. *See* Respondents' App. at 26b-35b. *Atherton*, on the other hand, dealt with an Assistant United States Attorney who unilaterally removed a grand juror when he was *not* involved whatsoever in presenting a case to the grand jury, and the D.C. Circuit recognized this express distinction. *Atherton*, 567 F.3d at 687 ("In this case, however, Zachem was not the AUSA who was presenting evidence to the grand jury. . . . Zachem's alleged activities–improperly removing a grand juror on the basis of his ethnicity and/or for the content and quality of his deliberations–had nothing to do with a prosecutor's preparation for or participation in a criminal trial."). Here, the Petitioner's claims relate only to the disposition of *charges* against him. *See Imbler*, 424 U.S. at 430 n.33.

[7] As this Court went on to note, "in terms of *Imbler*'s functional concerns, a suit charging that a supervisor made a mistake directly related to a particular trial, on the one hand, and a suit charging that a supervisor trained and supervised inadequately, on the other, would seem very much alike." *Goldstein*, 129 S.Ct. at 863.

[8] As noted in *Buckley*, in determining whether particular actions of government officials fit within a common-law tradition of absolute immunity, or only the more general standard of qualified immunity, this Court applies a "functional approach" which looks to the nature of the function performed, not the identity of the

consistent with this Court's precedents stemming from *Imbler*, *Goldstein* reaffirmed that prosecutors engaged in their prosecutorial duties are entitled to absolute prosecutorial immunity from a plaintiff's claims brought under 42 U.S.C. § 1983, and because the Petitioner's claims merely mirror those claims addressed in *Imbler*, i.e., whether to present a case to the grand jury and whether to dismiss a criminal charge, the Fifth Circuit's underlying Opinion was completely consistent with this Court's precedents and the holdings of its sister courts. In fact, this Court addressed the Petitioner's precise arguments sixteen years ago in *Buckley v. Fitzsimmons*, noting that

> [p]etitioner argues that *Imbler*'s protection for a prosecutor's conduct "in initiating a prosecution and in presenting the State's case[]" extends only to the act of initiation itself and to conduct occurring in the courtroom. This extreme position is plainly foreclosed by our opinion in *Imbler* itself. We expressly stated that "the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom," and are nonetheless entitled to absolute immunity.

509 U.S. 259, 272 (1993) (Stevens, J.) (internal citations omitted). As a result, the Petitioner has demonstrated no compelling reason for this Court to grant his Petition. *See* Sup. Ct. R. 10.

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actor who performed it. *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993).

B. The Petitioner Refuses to Recognize the Well-Established Precedents Supporting the District Attorney Respondents' Entitlement to Absolute Prosecutorial Immunity

Petitioner argues that prosecutorial immunity should not be recognized in this instance due to the fact that the District Attorney Respondents did not, *inter alia*, show "that the type of conduct or function at issue was immune from liability in 1871" when the Civil Rights Act was passed.[9] *See* Petition at pp. 24-25. This argument, however, misses the point of the present analysis. *See* Sup. Ct. R. 10. Even assuming, *arguendo*, that the Petitioner sets out a proper test for the determination of whether immunity is appropriate in a new or unique area of law, the issues raised by *this* Petitioner are well settled by this Court's prior precedents and uniformly applied across the various circuit courts. As a result, no "compelling reason" exists for the granting of the Petition. *See id.*

The well-settled nature of the existence of prosecutorial immunity for claims like those asserted by the Petitioner distinguishes this case from, for example, the case in *Buckley v. Fitzsimmons*, where the Court addressed a new question before it regarding a prosecutor's immunity for statements made to the press, and finding that a prosecutor was entitled only

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[9] This Court recognized in *Imbler* that the first American case to address the question of a prosecutor's amenability to a common-law tort action was not until 1896. *Imbler*, 424 U.S. at 420 (citing *Griffith v. Slinkard*, 146 Ind. 117, 44 N.E. 1001 (1896)).

to qualified immunity with regard to such claims.[10] 509 U.S. 259 (1993). On the other hand, specific to this case, the Plaintiff asserts that the County Respondents should be held liable under 42 U.S.C. § 1983 for failing to dismiss pending charges in accordance with a procedural statute governing the presentment of an indictment to the grand jury. *See* Petition at 27. However, it has long been well established that prosecutors are absolutely immune from damages based upon allegations relating to their decisions about *when* to dismiss charges. *Jerrytone v. Musto*, 167 Fed. App'x 295, 300 (3rd Cir. 2006) (unpublished opinion); *Sheehan v. Colangelo*, 53 Fed. App'x 584, 585 (2nd Cir. 2002) (unpublished opinion); *Joseph v. Yocum*, 53 Fed. App'x 1, 2 (10th Cir. 2002) (unpublished opinion) (quoting *Imbler*); *Goss v. Oregon*, 36 Fed. App'x 595, 595 (9th Cir. 2002) (unpublished opinion) (citing *Imbler*); *Walker v. Gasparini*, No. 99-3379, 2000 WL 133837, *1 (7th Cir. Feb. 2, 2000) (unpublished opinion); *Morley v. Walker*, 175 F.3d 756, 760 (9th Cir. 1999); *Brodnicki v. City of Omaha*, 75 F.3d 1261, 1267-68 (8th Cir. 1996); *Guzman-Rivera v. Rivera-Cruz*, 55 F.3d 26, 31 (1st Cir. 1995); *Fisher v. United States*, No. 91-1439, 1992 WL 63516, *1 (1st Cir. April 1, 1992) (unpublished opinion). While the Petitioner argues that the dismissal of the charges against him was a "ministerial action" which could have been performed

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[10] *Buckley* also addressed the immunity afforded to prosecutors when involved in investigative acts rather than functioning as "advocates." *Buckley*, 509 U.S. at 274-76. The *Buckley* court determined that this issue was foreclosed by the holding in *Burns v. Reed*, 500 U.S. 478, 495 (1991), which held that prosecutors were entitled only to qualified immunity for advice given to police officers during the course of an investigation.

by anyone, he cites no authority supporting this claim that his dismissal "could have been performed by anyone in the prosecutor's office, such as a clerk[,]" and the aforementioned cases make clear that decisions on *when* to dismiss charges are decisions within a prosecutor's discretion and are therefore entitled to the protection of absolute prosecutorial immunity. *Compare id.*, *with* Petition at 24. As a result, the Fifth Circuit's opinion is in line with the decisions of this Court, as well as its sister circuits, and no compelling reason for granting the Petition exists. Sup. Ct. R. 10.

II.
Courts Uniformly Hold That Prosecutors Retain Their Absolute Immunity For Violations of A State Procedural Statute or Rule

A. Prosecutors Are Absolutely Immune From 42 U.S.C. § 1983 Claims Based Upon Violations of State Procedural Rules or Statutes

In his third issue presented to this Court, the Petitioner suggests that certiorari should be granted so that this Court may determine whether prosecutors retain absolute immunity for a failure to comply with a state procedural statute or rule. *See* Petition at 27-28. However, the circuit courts have uniformly held that prosecutors retain their absolute immunity from such claims which are, in any event, insufficient to establish a violation of the United States Constitution for which recovery under 42 U.S.C. § 1983 is available.

It is well-established law that 42 U.S.C. § 1983 provides a cause of action only for the violation of

federal constitutional or statutory rights and not rights imputed to citizens under state law. *Collins v. City of Harker Heights*, 503 U.S. 115, 119 (1992) ("Although [§ 1983] provides the citizen with an effective remedy against those abuses of state power that violate federal law, it does not provide a remedy for abuses that do not violate federal law."); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155 (1978) (quoting 42 U.S.C. § 1983); *Pierce v. Gilchrist*, 359 F.3d 1279, 1289 (10th Cir. 2004) (explaining § 1983 provides a cause of action for the deprivation of federal constitutional rights, it "does not provide a federal cause of action for every violation of state common law"); *Neinast v. Bd. of Trs. of Columbus Metro. Liab.*, 346 F.3d 585, 595 (6th Cir. 2003). This, however, is exactly the type of liability this Petitioner seeks to impose upon the County Respondents. Specifically, the Petitioner seeks to have this Court review whether prosecutors "may [] ignore [state] statutory law that expressly governs their conduct[.]" Petition at 27. However, the circuit courts have uniformly held that the violation of state procedural statutes do not constitute a violation of a *federal* right for which § 1983 liability may be imposed.

The State of Texas has no Speedy Trial Act.[11] *See Meshell v. State*, 739 S.W.2d 246 (Tex. Crim. App. 1987) (holding Texas Speedy Trial Act violated Texas Constitution); *cf.* Petition at 23-24 ("dismissal of the charges against Quinn in compliance with the Texas speedy-trial statute..."). However, its Code of Criminal

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[11] Many other states do have valid Speedy Trail Acts or rules governing same. *See, e.g.*, Ohio Rev. Code § 2945.71; Fla. R. Crim. P. 3.191.

Procedure does contain a statute governing the filing of an indictment against an arrested person. Tex. Code Crim. Proc. § 32.01 (Vernon 2006); *but see Ex parte Young*, 213 S.W.3d 327 (Tex. Crim. App. 2006) (Tex. Code Crim. Proc. § 28.061 (Vernon 2006), the sister statute to Tex. Code Crim. Proc. § 32.01 requiring that the dismissal of any indictment or complaint pursuant to § 32.01 be a dismissal *with prejudice*, violates the Texas Constitution). In his Petition, the Petitioner has–erroneously–stated that "[t]here are no cases directly on point for the assertion that prosecutors must obey on point, controlling statutes . . . in order to be entitled to immunity[.]" Petition at 27. However, the various circuit courts have routinely held that a violation of a state procedural rule or statute (often a state Speedy Trial Act) does not itself constitute a viable federal claim brought under 42 U.S.C. § 1983.[12] *See Allen v. Dept. of Corr. State of Florida*, 288 Fed. App'x 643, 645, 645 n.1 (11th Cir. 2008) (unpublished opinion) (finding "meritless" the argument that a violation of Florida's speedy trial rule was a federal constitutional claim merely because "that [state] rule is based on the United States Constitution"); *United States v. Ross*, Nos. 93-3772, 93-3880, 93-3901, 93-3915, 93-3916, 93-4040, 93-4198, 1995 WL 253183, *4 n.6 (6th Cir. April 27, 1995) (unpublished opinion) (rejecting argument that violation of state speedy trial statute was an indication of a constitutional violation because "state statutes may set a stricter deadline

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[12] In many instances, a violation of a state Speedy Trial Act results in the pending criminal charges being dismissed with prejudice to the refiling of same. *See, e.g.*, Ohio Rev. Code § 2945.73; Fla. R. Crim. P. 3.191(n); *cf. Ex Parte Young*, 213 S.W.3d 327 (requirement of dismissal with prejudice unconstitutional in Texas).

than the Constitution requires"), *vacated on other grounds* 516 U.S. 1024 (1995) (mem.); *Stewart v. Nix*, 972 F.2d 967, 970 (8th Cir. 1992) ("A *state* statute, however, has no bearing on whether the State violated Stewart's *federal* right to a speedy trial as protected by the Sixth Amendment.") (emphasis in original); *Wells v. Petsock*, 941 F.2d 253, 256 (3rd Cir. 1991) ("Pennsylvania's 180-day rule does not define the contours of the federal constitutional right to a speedy trial."); *Cotten v. Marshall*, No. 85-3925, 1986 WL 16893, *2 (6th Cir. April 17, 1986) (unpublished opinion) (contention that state speedy trial statute was violated "merely raises an issue under state law"); *United States ex rel. Little v. Twomey*, 477 F.2d 767, 770 (7th Cir. 1973). Neither, then, is a violation of a Texas procedural statute which is *not* a Speedy Trial Act and which requires only a dismissal *without* prejudice a cognizable violation of federal law for which recovery under § 1983 is viable, as the violation of this state statute has no bearing on whether the Petitioner's federal rights were violated. *Id.*

Additionally, when the circuit courts have addressed the issue of whether a prosecutor retains his immunity from speedy trial claims, they have uniformly ruled that such claims fall within the prosecutor's official prosecutorial functions. *See Shmueli v. City of New York*, 424 F.3d 231, 236-39 (2nd Cir. 2005) (in case never tried and ultimately dismissed pursuant to speedy trial statute, prosecutor was absolutely immune from post-arraignment allegations that the prosecutors "'maliciously prosecuted [Shmueli] for various crimes, all of which they knew she was innocent of committing' and 'intentionally ... delayed the criminal proceedings with

the intent of harassing' her"); *Logan v. Late[illegible]*, 24 Fed. App'x 579, 581 (7th Cir. 2001) (unpublished opinion) (prosecutors would be absolutely immune from allegation they delayed defendant's trial); *Miller v. Jones*, No. 96-6077, 1996 WL 421933, *1 (10th Cir. July 29, 1996) (unpublished opinion) (prosecutors are absolutely immune from, *inter alia*, claim for speedy trial violation); *Geter v. State of Arizona*, No. 90-16059, 1990 WL 212618, *1 (9th Cir. Dec. 20, 1990) (unpublished opinion) (prosecutor absolutely immune from claims of, *inter alia*, denial of right to speedy trial); *Ledwith v. Douglas*, 568 F.2d 117, 119 (8th Cir. 1978) ("Appellants's 1983 claim for damages for libel and denial of a speedy trial are barred by the doctrine of prosecutorial immunity enunciated in *Imbler* []"). As a result, even if the Petitioner had enunciated a viable claim for a violation of his *federal* speedy trial right, the County Respondents would be entitled to absolute prosecutorial immunity from those claims. *Imbler*, 424 U.S. at 431 n.33; *id.*; *see also supra* at Part I.

B. The Petitioner Has Failed to Allege Facts Establishing A Violation of His Sixth Amendment Right to Receive a Speedy Trial

Furthermore, the Petitioner also makes the fundamental error of asserting throughout his Petition that his right to a speedy trial under the Sixth Amendment has been violated. *See, e.g.*, Petition at 32. Contrary to Petitioner's claim, this Court's precedents make clear that the Petitioner suffered no harm under the Sixth Amendment which would be compensable under 42 U.S.C. § 1983. In this regard, while the Petitioner attempts to force his claims within the confines of the test espoused by this Court in *Barker v. Wingo*, 407 U.S. 512 (1972), the fundamental error

from which the Petitioner's analysis cannot recover is a failure to recognize that the Petitioner was never indicted, much less forced to suffer a *trial* for the criminal charges upon which he was arrested. *See* Petition at 4; Petitioner's App. at 7. In this regard, the "speedy trial" violation of which the Petitioner complains is the allegedly unconstitutional length between his arrest and the presentation of his case to the grand jury. Petition at 27; Petitioner's App. at 22. However, this Court has made absolutely clear that in order "to trigger a [Sixth Amendment] speedy trial analysis," a plaintiff must make allegations relating to "the interval between accusation and *trial*[.]" *Doggett v. United States*, 505 U.S. 647, 651 (1992) (emphasis added). The *Doggett* court went on to note that the "Sixth Amendment right of the accused to a speedy trial has no application beyond the confines of a formal criminal prosecution[.]" *Id.* at 654. While it is undisputed that this right *attaches* at the earlier of a defendant's arrest or indictment, for purposes of determining whether there has been a Sixth Amendment violation, only the time between triggering incident, i.e., the indictment or arrest, and the *trial* is considered. *United States v. Hatcher*, 300 Fed. App'x 659, 662 (11th Cir. 2008) (unpublished opinion) ("for Sixth Amendment speedy trial purposes, only the time between indictment or arrest and trial is considered") (citing *United States v. Marion*, 404 U.S. 307, 320 (1971)).[13] Once charges are dismissed, the

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[13] As this Court noted in *Dillingham v. United States*, it is "either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment." 423 U.S. 64, 65 (1975). However, while the *Dillingham* court went on to note that "[i]nvocation of the

speedy trial guarantee is no longer applicable. *United States v. McDonald*, 456 U.S. 1, 8 (1982). Put simply, because there was no trial in the case at bar–nor even the genuine threat of the Petitioner being put to trial by the County Respondents due to the fact that the County Respondents never returned an indictment against him–the Petitioner's Sixth Amendment right, while it attached, was never fully implicated, and, as a result, the Petitioner cannot establish a compensable Sixth Amendment violation. *Doggett*, 505 U.S. at 651; *id.* Therefore, because the Petitioner has not even demonstrated the existence of a viable Sixth Amendment claim, upon which he bases his Petition for this Court's review, no compelling reason for a grant of certiorari exists. *See* Sup. Ct. R. 10.

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speedy trial provision thus need not await indictment, information, or other formal charge[,]" this Court was addressing an instance where a criminal defendant, whose Sixth Amendment right had attached, still faced a future criminal trial on the charges pending against him. *Id.* In this instance, it is clear from the undisputed facts that no such trial ever occurred. Further, the state trial court properly released the Petitioner from his bond under the procedural statute which forms the basis of his claims. Petitioner's App. at 7. As a result, while *Dillingham* certainly supports the proposition that a criminal defendant–in fear of a future trial–need not wait to assert his Sixth Amendment speedy trial right until after he is put to trial in violation thereof, it does not stand for the proposition that, where no trial ever occurred, a violation of the individual's Sixth Amendment rights occurred.

III.
The Fifth Circuit's Holding That the District Attorney Respondents Were Entitled To Eleventh Amendment Immunity In Their Official Capacities Was Consistent With Its Sister Circuits

A. Texas Law Dictates That The District Attorney Respondents In Their Official Capacities Were State Actors

In his fourth point, the Petitioner presents to this Court the question of whether the District Attorney Respondents, and county employees generally, are entitled to Eleventh Amendment immunity when sued in their individual capacities. Petition at 28. But the Petitioner plainly misreads the Fifth Circuit's Opinion on this point because the Fifth Circuit objectively did not hold that Eleventh Amendment immunity was applicable to these officials in their individual capacities. Petitioner's App. at 27. To the contrary, the Fifth Circuit only addressed Petitioner's argument on appeal that "the district court erred by finding that the county prosecutors were protected by Eleventh Amendment immunity from being sued in their *official capacities*[.]" *Id.* (emphasis added). The Fifth Circuit then held that the District Attorney Respondents were entitled to Eleventh Amendment immunity from the Petitioner's claims asserted against them in their official capacities due to the fact that, because they were engaged in the course of their capacities as prosecutors, they acted as state rather than county employees for the acts alleged by the Petitioner. *Id.* at 27-28; *see supra* at Part I. The Fifth Circuit, separately, determined that the District Attorney Respondents were entitled to prosecutorial immunity

in their individual capacities from the Petitioner's claims. Petitioner's App. at 24-27. As the County Respondents have demonstrated, *supra*, the Fifth Circuit's holding with regard to the prosecutorial immunity of the District Attorney Respondents in their individual capacities is consistent with the jurisprudence of this Court and the Fifth Circuit's sister courts. *See supra* at Part I(A); *Nivens v. Gilchrist*, 444 F.3d 237, 249-50 (4th Cir. 2006) (while Eleventh Amendment immunity does not bar individual capacity claim against prosecutor, absolute prosecutorial immunity does); *Willhauck v. Halpin*, 953 F.2d 689, 711 n.22 (1st Cir. 1991) ("a § 1983 action brought after the fact for damages against prosecutors in their individual capacity would, as the district court correctly observed, be barred by the doctrine of prosecutorial immunity.").

Furthermore, the Fifth Circuit's determination that the District Attorney Respondents were entitled to Eleventh Amendment immunity for the official capacity claims asserted against them is wholly consistent with the analysis used throughout the circuit courts to make similar determinations. In this regard, the circuit courts, including the Fifth Circuit, look to state law to determine whether a particular official in his official capacity is the legal equivalent of the State. *See, e.g.*, *Garcia v. City of Chicago*, 24 F.3d 966, 969 (7th Cir. 1994); *Esteves v. Brock*, 106 F.3d 674, 678 (5th Cir. 1997) ("Texas law makes clear, however, that when acting in the prosecutorial capacity to enforce state penal law, a district attorney is an agent of the state"); *Coleman v. Kaye*, 87 F.3d 1491, 1500-05 (3d Cir. 1996) (explaining that county prosecutors in New Jersey act as county officials when performing administrative functions, but they act as state officers

when they engage in classic law enforcement and investigative functions); *Owens v. Fulton County*, 877 F.2d 947, 952 (11th Cir. 1989) (differentiating Georgia district attorneys' state and county functions). The Fifth Circuit, which has federal appellate jurisdiction over the State of Texas, has analyzed Texas law and determined that when acting in a prosecutorial capacity, a district attorney is an agent of the State, not an agent of the county in which the criminal case happens to be prosecuted, and is thus protected by Eleventh Amendment immunity from claims asserted against him in his official capacity. 28 U.S.C.A. § 41 (West 2006); *Esteves*, 106 F.3d at 678; *see also Spikes v. Phelps*, 131 Fed. App'x 47, 49 n.1 (5th Cir. 2005) (unpublished opinion) ("Texas district attorneys are shielded by Eleventh Amendment immunity for acts performed as state officers in the scope of criminal prosecution, but they are not so shielded when they act with respect to local policies."). This analysis conducted by the Fifth Circuit has been unique to Texas, and the Fifth Circuit has held that the state laws governing district attorneys in each of the three states encompassed by its jurisdiction are each affected differently by Eleventh Amendment immunity. *See Hudson v. City of New Orleans*, 174 F.3d 677, 691 (5th Cir. 1999) (holding that a Louisiana parish district attorney's office is not entitled to Eleventh Amendment immunity); *Chrissy F. by Medley v. Mississippi Dept. of Public Welfare*, 925 F.2d 844, 849 (5th Cir. 1991) (Mississippi district attorneys' offices are wholly state agencies). Further, this conclusion regarding Texas District Attorneys is not unique and creates no conflict amongst the circuits, as many circuit courts have held that under the laws of the particular states at issue, district attorneys engaged in their prosecutorial functions are agents of

the state and are therefore entitled to Eleventh Amendment immunity from claims asserted against them in their official capacities. *See Del Campo v. Kennedy*, 517 F.3d 1070, 1073 (9th Cir. 2008) (California district attorneys entitled to Eleventh Amendment immunity when acting within their prosecutorial capacity); *Gradle v. Oklahoma*, 203 Fed. App'x 179, 183 (10th Cir. 2006) (unpublished opinion) (dismissing official capacity claims against Oklahoma district attorney on Eleventh Amendment grounds); *Nivens*, 444 F.3d at 249 (official capacity claims against North Carolina district attorneys dismissed due to Eleventh Amendment immunity); *Rodriguez v. Weprin*, 116 F.3d 62, 66 (2nd Cir. 1997) (New York district attorneys entitled to Eleventh Amendment immunity from official capacity claims). As a result, because the Fifth Circuit's interpretation of Texas law is entirely consistent with the similar determinations many other circuit courts have made with regard to the protection of state district attorneys from official capacity claims via the Eleventh Amendment – depending on the law of the state at issue – there exists no compelling reason for this Court to grant the Petition. Sup. Ct. R. 10.

B. Even If Absolute Prosecutorial Immunity Is Inapplicable Herein, The Fifth Circuit Determined the District Attorney Respondents Were Entitled to Qualified Immunity In Their Individual Capacities

Furthermore, the Fifth Circuit agreed with the District Court's determination that, even were the District Attorney Respondents not entitled to absolute prosecutorial immunity, they were entitled to qualified immunity due to the fact that the Petitioner had failed

to allege facts establishing a constitutional violation. Petitioner's App. at 25. It is well settled that where prosecutorial immunity is inapplicable, prosecutors are still entitled to qualified immunity from a plaintiff's claims. *Burns v. Reed*, 500 U.S. 478 (1991) (prosecutors entitled to qualified immunity when not entitled to absolute immunity); *al-Kidd v. Ashcroft*, 580 F.3d 949, 958 (9th Cir. 2009) (prosecutors entitled to qualified immunity when not entitled to absolute immunity); *Kulwicki v. Dawson*, 969 F.2d 1454, 1463 (3rd Cir. 1992). Further, as the Fifth Circuit held, it is well settled that in order to defeat a governmental agent's claim of qualified immunity, a plaintiff must plead a violation of a federally secured right. *Pearson v. Callahan*, 129 S.Ct. 808, 818 (2009). The District Court in the case at bar determined that the Petitioner had failed to state a viable claim, either for a violation of his Due Process or Sixth Amendment speedy trial rights, and the Fifth Circuit agreed. Petitioner's App. at 25 & 38. However, the Petitioner does not address this portion of the underlying Opinion. Instead, he only alleges that he has stated a viable claim under the Sixth Amendment because this Court should hold that money damages are available for a violation thereof. Petition at 37. But the Petitioner's Sixth Amendment claim fails not (only) because money damages are an unavailable remedy thereunder, but because his Sixth Amendment rights were never fully implicated, an issue not addressed in the Petition. *See supra* at Part II(B); *infra* at Part IV(A); *Albright*, 510 U.S. at 275 ("We express no view as to whether petitioner's claim would succeed under the Fourth Amendment, since he has not presented that question in his petition for certiorari."). Because, as discussed *supra*, the Fifth Circuit's Opinion on these issues was directly in accordance with this Court's precedents, is

consistent with the decisions of its sister courts, and, because in any event the District Attorney Respondents would be entitled to qualified immunity from the Petitioner's claims, there exists no compelling reason for this Court to grant the Petition. Sup. Ct. R. 10.

IV.
This Petitioner Is Not Entitled To Money Damages For An Alleged Sixth Amendment Violation

A. The Fifth Circuit's Holding Did Not Preclude the Recovery of Money Damages For a Sixth Amendment Violation–It Merely Held That No Speedy Trial Violation Had Occurred

While the Petitioner reads the Fifth Circuit's comment that "[t]he only remedy for a violation of the Sixth Amendment right to a speedy trial is dismissal of any criminal charges" to establish that the Fifth Circuit has taken the position that money damages are never recoverable under 42 U.S.C. § 1983 for a violation of a plaintiff's Sixth Amendment right to a Speedy Trial, the Petitioner, again, misreads the substance of the Fifth Circuit's comment. Petitioner's App. at 23. Contrary to the Petitioner's reading, the Fifth Circuit's comment merely establishes that in the case at bar no Sixth Amendment violation could have occurred for which the Petitioner could conceivably seek such damages under § 1983 herein. *Id.* In this regard, "this Court has held dismissal of the indictment to be the proper remedy when the Sixth Amendment right to a speedy trial has been violated." *United States v. MacDonald*, 435 U.S. 850, 861 n.7 (1978). But in the case at bar, it is undisputed that the

Petitioner was never indicted, and no charges were ever brought against him by the County Respondents. *See* Petition at 7. As a result, because no recourse provided by the Sixth Amendment could have been granted in the underlying case (i.e., no indictment against the Petitioner levied by the County Respondents could have been dismissed based upon a violation of the Petitioner's speedy trial right because such an indictment never existed), no Sixth Amendment violation compensable under 42 U.S.C. § 1983 could possibly have occurred. *Id.*

The Petitioner protests this finding by the Fifth Circuit by asserting, correctly, that the Sixth Amendment right to receive a speedy trial attaches at the time of arrest or indictment, whichever occurs first. Petition at 34-35. However, the time of the right's attachment has no effect on whether there was, ultimately, a constitutional violation.[14] In fact, the Fifth Circuit expressly recognized this as the proper law governing the right's attachment in its Opinion. Petitioner's App. at 22. However, as demonstrated *supra*, while the right attaches at the earlier of arrest or indictment–starting the clock on the criminal defendant's behalf–the right itself protects a defendant's right to receive a speedy *trial*. *See supra* at Part II(B); U.S. CONST. amend. VI; *Doggett*, 505 U.S. at 651. Because no indictment was ever returned against

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[14] For example, a citizen's Fourth Amendment right to be free from illegal search and seizure could be said to always been attached, because a citizen is always entitled to the Fourth Amendment's protection, but a cognizable violation of the Fourth Amendment must occur in order for same to be compensable under 42 U.S.C. § 1983. *See Tennessee v. Garner*, 471 U.S. 1 (1985) (affirming § 1983 liability based on Fourth Amendment violation).

the Petitioner by the County Respondents, there was never a genuine threat of his being tried, and the remedy available to the courts to cure such a Sixth Amendment violation (i.e., dismissal of the criminal indictment) was at all times unavailable to the state trial court as there existed no indictment to dismiss.[15] *MacDonald*, 435 U.S. at 861 n.7. As a result, because there was no violation of the Petitioner's Sixth Amendment rights, the Fifth Circuit correctly held that he lacked standing to bring a claim for an award of money damages based upon this alleged violation. Petitioner's App. at 23-24 ("plaintiff must show a 'substantial likelihood that the requested relief will remedy the alleged injury in fact'") (quoting *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000)).

This holding that Petitioner lacked standing to assert a claim under the Sixth Amendment was also directly in line with this Court's precedents on the issue of standing. In this regard, this Court has held that "[t]he question of standing . . . concerns . . . the question [of] whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Assoc. of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970).[16] The circuit courts and lower courts

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[15] Again, it is important to note that the pending charges against the Petitioner *were* dismissed pursuant to Tex. Code Crim. Proc. § 32.01. Petitioner's App. at 7.

[16] Notably, the "zone of interests" test is an element of prudential standing, not Article III standing, as this Court has repeatedly noted. *See, e.g., Bennett v. Spear*, 520 U.S. 154, 162 (1997)

have interpreted this doctrine to bar suits when a plaintiff seeks recovery under a particular provision of the Constitution and the Constitutional provision cited does not protect the interest sought to be redressed by the plaintiff. *See Cntr. for Reproductive Rights v. Bush*, 304 F.3d 183, 186 (2nd Cir. 2002) (Sotomayor, J.) ("We dismiss the due process claim under the doctrine of prudential standing, as plaintiffs' alleged harm does not fall within the zone of interests protected by the Due Process Clause."); *Calvin v. Conlisk*, 534 F.2d 1251, 1253 (7th Cir. 1976) (plaintiff lacked standing when asserted Fourteenth Amendment claims fell outside of Fourteenth Amendment's zone of interests); *see also Lightfoot v. Maine Dept. of Health & Human Servs.*, Civil No. 06-53-B-W, 2006 WL 2925243, *5 (D. Me. Oct. 11, 2006) (finding no standing where Magistrate Judge found plaintiff's "allegations of rights violations simply do not fall within the zone of interests protected by the First, Fifth, and Fourteenth Amendments."). Because no issue relating to whether an otherwise compensable violation of the Petitioner's Sixth Amendment rights occurred has been presented to this Court, the Petitioner has given no compelling reason to grant the Petition and address the Petitioner's issue of "first impression" on the availability of money damages for a Sixth Amendment speedy trial violation. Sup. Ct. R. 10; *Albright*, 510 U.S. at 275.

("Numbered among these prudential requirements is the doctrine of particular concern in this case: that a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit.").

B. This Court Has Held That Dismissal of A Criminal Indictment Is the Sole Remedy For A Violation of A Defendant's Sixth Amendment Right to Receive a Speedy Trial

Finally, even while the Petitioner presents what he styles as an issue of "first impression" before this Court: whether a plaintiff may recover money damages under 42 U.S.C. § 1983 for a violation of his Sixth Amendment right to a speedy trial, no compelling reason exists for this Court to grant certiorari on this ground in this case. Petition at 32; Sup. Ct. R. 10. First and foremost, as demonstrated, *supra*, the Petitioner has failed to demonstrate the existence of a cognizable Sixth Amendment violation by the County Respondents because they never returned a criminal indictment against him, and, as a result, his right to a speedy trial, as protected by the Sixth Amendment, could not have been violated. *See supra* at II(B), IV(A). Secondly, however, as has been recognized by other courts, this Court has spoken with regard to the specific remedies available to a party whose right to receive a speedy trial is infringed. Specifically, "this Court has held dismissal of the indictment to be the proper remedy when the Sixth Amendment right to a speedy trial has been violated.[.]" *MacDonald*, 435 U.S. at 861 n.7; *see also Midland Asphalt Corp. v. United States*, 489 U.S. 794, 801 (1989); *Barker*, 407 U.S. at 522 (dismissal of indictment is the "only possible remedy" for violation of Sixth Amendment right to speedy trial). The lower courts have also recognized that money damages are not available for such a violation. *Cayton v. United States*, No. 97-5023, 1998 WL 563848, *2 (Fed. Cir. Sep. 4, 1998) (unpublished opinion) (money damages not available for violation of Sixth Amendment right to speedy trial under § 1983);

Bauman v. Hidalgo County, Texas, No. M-Civ.A. 04-145, 2005 WL 1653082, *5 n.1 (S.D. Tex. July 6, 2005). Additionally, there is nothing unusual about the federal courts recognizing that certain constitutional rights have remedies other than money damages under 42 U.S.C. § 1983. Similar findings have been noted for other prophylactic Sixth Amendment rights enshrined by the Constitution. *See Bradley v. Health Midwest, Inc.*, 203 F. Supp. 2d 1254, 1259 (D. Kan. 2002) (stating that the court has "been unable to find a single case where the plaintiff was awarded money damages under a § 1983 claim for deprivation of the right to counsel."); *Basheer v. Isola*, Civ. A. No. 86-6206, 1987 WL 7626, *1 (E.D. Pa. March 9, 1987) (no money damages for violation of Sixth Amendment right to counsel). As a result, the only remedy available to the Petitioner for the alleged violation of his Sixth Amendment speedy trial right would have been the dismissal of the criminal indictment, and he is therefore precluded from seeking money damages herein.

From a logical standpoint, such a rule is completely consistent with this Court's precedent on absolute prosecutorial immunity, discussed *supra*. *See supra* at Part I. Any claim brought under 42 U.S.C. § 1983 based upon allegations that the plaintiff's right to receive a speedy trial had been violated would necessarily name as the defendants those individuals charged with bringing the plaintiff's case to trial: the District Attorney and assistant district attorneys handling the case. However, as this Court has noted, acts such as "whether and when to prosecute [a defendant]" are "intimately associated with the judicial phase of the criminal process" and the prosecutors would therefore be entitled to absolute immunity from

civil damages, even if their intentions were malicious or untoward. *Imber*, 424 U.S. at 427, 430, 430 n.33; *see, e.g.*, *Pierce v. Roberts*, No. 6:06-CV-042 (WLS), 2007 WL 433545, *1 (M.D. Ga. Feb. 5, 2007) (dismissing, *inter alia*, § 1983 speedy trial claim against prosecutor because he was absolutely immune from same). As a result, allowing the recovery of money damages for a Sixth Amendment speedy trial violation would require the Court to create a new judicial exception to the doctrine of absolute prosecutorial immunity when this Court, as recently as its last term, unanimously reaffirmed the principle that "the immunity that the law grants prosecutors is 'absolute.'" *Goldstein*, 129 S.Ct. at 860; *see Springmen v. Williams*, 122 F.3d 211, 213 (4th Cir. 1997) (prosecutors absolutely immune from decisions regarding whether and when to prosecute); *Geter*, 1990 WL 212618 at *1 (dismissing, off hand, plaintiffs § 1983 claim that prosecutors denied plaintiff's right to speedy trial as barred by absolute prosecutorial immunity). Because doing so would contravene this Court's repeated express holdings that prosecutors–the only viable defendants in such an action–are absolutely immune from their conduct related to judicial proceedings, the Petitioner has failed to demonstrate any compelling reason that this Court should grant his Petition merely to reaffirm this same, well-established principal, and, as a result, the Petition should be denied. Sup. Ct. R. 10.

CONCLUSION

For the foregoing reasons, the Court should deny the Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

CIVIL ACTION NO. 4:06CV120

JURY TRIAL DEMANDED **42 U.S.C. §1983**

[Filed June 12, 2006]

John Gerard Quinn,	)
	)
Plaintiff,	)
	)
vs.	)
	)
John Roach, individually and in his official capacity as Collin County District Attorney, **Gail Leyko, Manuel Gonzales, Curtis Howard**, **Kristi Tyler**, and **Michelle Voirin**, individually and in their official capacities as Collin County Assistant District Attorneys, **Jose Quiles** and **Five John Doe Defendants,** individually and in their official capacity as McKinney, Texas police officers, **Laurie Houston** and **Katie Quinn**, individuals, **Collin County, Texas**,	)

and the **City of McKinney, Texas,**)
)
Defendants.)
)

SECOND AMENDED COMPLAINT

Plaintiff John Gerard Quinn files this Second Amended Complaint alleging violations of Plaintiff's common-law, statutory, and clearly-established constitutional rights by the Defendants, and seeks money damages, costs, and injunctive relief all as prayed for herein. This First Amended Complaint is filed before any responsive pleadings have been filed. FRCP 15(a).

This case tells a story of deception, immorality, greed, incompetence, and pain that is difficult to believe could actually happen in 21st century America under the watchful eyes of supposedly-well-trained public servants. But it did.

PARTIES

1. Plaintiff John Gerard Quinn is an individual resident of McKinney, Collin County, Texas.

2. Defendant John Roach is an individual resident of Collin County, Texas, and is and was the duly-elected District Attorney for Collin County, Texas at all times relevant to this case. He has already been served with process, and is before the Court for all purposes.

3. Defendant Gail Leyko, formerly known as Gail Falco, is an individual, resident of Collin County,

Texas, and is or was an assistant district attorney for Collin County, Texas at all times relevant to this suit. She has already been served with process, and is before the Court for all purposes.

4. Defendant Manuel Gonzales is an individual, resident of Collin County, Texas, and is or was an assistant district attorney for Collin County, Texas at all times relevant to this suit. He has already been served with process, and is before the Court for all purposes.

5. Defendant Curtis Howard is an individual, resident of Collin County, Texas, and is or was an assistant district attorney for Collin County, Texas at all times relevant to this suit. He has already been served with process, and is before the Court for all purposes.

6. Defendant Kristi Tyler is an individual, resident of Collin County, Texas, and is or was an assistant district attorney for Collin County, Texas at all times relevant to this suit. She has already been served with process, and is before the Court for all purposes.

7. Defendant Michelle Voirin is an individual, resident of Collin County, Texas, and is or was an assistant district attorney for Collin County, Texas at all times relevant to this suit. She has already been served with process, and is before the Court for all purposes.

8. Defendant Jose Quiles is an individual, resident of Collin County, Texas, is and was employed as a McKinney, Texas police officer at all times relevant to

this suit. He has already been served with process, and is before the Court for all purposes.

9. Defendant Laurie Houston is an individual, resident of Denton County, Texas. She has already been served with process, and is before the Court for all purposes.

10. Defendant Katie Quinn is an individual, resident of Denton County, Texas. She has already been served with process, and is before the Court for all purposes.

11. Defendant Collin County, Texas is a county organized under the laws of the State of Texas. It has already been served with process, and is before the Court for all purposes.

12. Defendant City of McKinney, Texas is a municipality organized under the laws of the State of Texas. It has already been served with process, and is before the Court for all purposes.

13. For ease of reference and not by way of limitation, Defendants John Roach, Gail Leyko, Manuel Gonzales, Michelle Voirin, Curtis Howard, and Kristi Tyler are sometimes hereafter referred to separately by their last names or collectively as the "District Attorney Defendants." At present, it is not known which of the individual District Attorney Defendants actually took particular actions, so they are herein referred to collectively. Discovery may reveal better details of their actual, individual participation. Plaintiff reserves the right to amend this Complaint when the actions taken by the

individual District Attorney Defendants have been determined.

14. For ease of reference and not by way of limitation, Defendants Laurie Houston and Katie Quinn are sometimes hereafter referred to as "Houston" and "Katie," respectively, and collectively at times as the "Family Defendants."

VENUE AND JURISDICTION

15. Venue is proper in the Eastern District of Texas in accordance with 28 U.S.C. §1391, since one or more of the Defendants reside in Collin County, Texas and a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in this District.

16. Jurisdiction is proper in this Court in accordance with 28 U.S.C. §1331 and 42 U.S.C. §1983. The Court has supplemental jurisdiction over Plaintiff's state-law claims in accordance with 28 U.S.C. §1367.

JURY DEMAND

17. Plaintiff hereby demands trial by jury. The jury fee, if required, will be submitted by Plaintiff when the Court orders it paid.

BACKGROUND FACTS

General History of the Case.

18. In 1982, Plaintiff and Laurie Quinn (now Houston) were married. The Quinns had two children

in this marriage: a son, Brian Quinn (DOB __/__/84), and a daughter, Katie Quinn (DOB __/__/87)(birth dates omitted per court rules).

19. In or around 1991, Plaintiff discovered that Houston was having an extra-marital affair and the couple promptly divorced. Following this divorce, Plaintiff was awarded primary custody of the Quinn's children. The Quinn children lived with Plaintiff 20 days per month, and he raised them without any financial or other assistance from Houston. Both Plaintiff and Houston later remarried other people, which marriages also ended in divorce. Defendant Houston kept her last name from this subsequent marriage.

20. Following her divorce from Plaintiff, Houston embarked on a lifestyle of decadence and license that would cause most Hell's Angels to blush. One brief sexual liaison quickly followed another and Houston entered—and apparently enjoyed—the seedy underworld of illegal drug trafficking and use, wild parties, and frequent and depraved social encounters, sexual and otherwise.

21. Plaintiff knew little to nothing of Houston's immoral lifestyle, but when Brian and Katie visited their mother, the Quinn children could not help but be exposed to it. Houston constantly denigrated Plaintiff and tried to persuade the Quinn children to move in with her full time—telling them that they would receive child support from Plaintiff and that she would then be able to buy them anything they wanted. Brian Quinn was appalled and disgusted with his mother's new lifestyle, but Katie was apparently fascinated by it.

22. Plaintiff was a sometimes-harsh critic of many of Houston's lifestyle choices, even just the limited things he knew about which were only a very small part of what was actually going on in Houston's life and home.

23. When she was 12 years old, Katie announced that she wanted to live with her mother. This move was brought about because Katie (correctly, it turns out) surmised that her mother would be far more liberal in the "freedoms" granted to Katie than was Katie's father, and Katie desired to have more license to do with her young life as she pleased. Katie moved in with her mother in or around May 2000.

24. When Katie began living with Houston, and unknown to Plaintiff, Houston began allowing Katie to enter Houston's slimy world with a vengeance. With her mother's knowledge and encouragement, Katie began to use illegal drugs, to stay away from home overnight, and to have sexual relations with numerous, serial paramours, often in the same house in which Katie and her mother were living. In fact, Houston allowed one of Katie's older boyfriends to move in with them so Katie—who at that time was only 14 or 15 years old—could have illicit, illegal sex with that young man whenever she liked. The license Katie had hoped her mother would allow was abundantly provided this teenage girl. Houston treated Katie as a "buddy" rather than as a dependent child who needed parental guidance and assistance.

25. Plaintiff was unaware of these facts until after his arrest. Plaintiff knew nothing of the live-in arrangements with Katie's boyfriend, the use of illegal drugs, or the lack of parental control Houston

exhibited toward Katie. Had Plaintiff known what was going on in the Houston household, he would have put a stop to it immediately.

26. Even given the past living arrangements and respective financial contributions of Plaintiff and Houston toward raising their children, and while under no legal compulsion to do so, Plaintiff generously continued to pay for Katie's expenses, including school clothing, medical insurance, dance lessons, singing lessons, gymnastics lessons, cheerleading lessons, etc. to help support his daughter. Plaintiff also attended Katie's extra-circular activities such as choir recitals, track meets, basketball games, and volleyball games as often as possible. This apparently was not enough for Houston.

27. In or around July 2002, when Brian Quinn turned 18 years old, Houston—without discussion or warning—sued Plaintiff in court for additional child support for Katie. To avoid a court fight, Plaintiff agreed to pay child support to Houston in the amount of $1,050.00 per month, plus medical insurance and 50% of un-reimbursed medical expenses. Subsequently, Houston began cutting off virtually all of Katie's access to Plaintiff. Plaintiff therefore had almost no idea what was happening in that household, except from sporadic reports made by Brian and Katie from time to time.

28. On July 14, 2003, Plaintiff's child support obligations were reduced to $500.00 per month plus 50% of un-reimbursed medical expenses due to his having been laid off from his job. Plaintiff and Houston were ordered to go to mediation in an attempt

to resolve what had by then become a bitter battle over child support and access to Plaintiff's daughter, Katie.

29. Mediation began in or around April 2004, just prior to Plaintiff's arrest. Plaintiff, at that time employed as a part-time consultant on a project-by-project basis, agreed to pay Houston $663.74 per month child support plus 50% of un-reimbursed medical expenses, with the stipulation that an additional $250.00 per month would be given directly to Katie, for a total of $913.74 per month. This stipulation was necessary due to Plaintiff's informed belief that Houston was using all or most previous child-support monies for, among other improper purposes, remodeling her house rather than taking care of Katie's needs.

The Child Support Battle Rages On.

30. Houston was clearly not satisfied with the mediated child-support arrangements. However, given the history of Plaintiff's full, solo support of Katie (and Brian) for a nine-year period from 1991 to 2000, his continued support of Katie from 2000 to 2004, given Houston's profligate waste of previous child-support monies, and given the illegal and morally-abhorrent lifestyle Houston was living and allowing Katie to live, Houston suspected (or perhaps her lawyer told her) that her chances of getting any court to grant her any larger sums of child support, purely on the merits of her request, were small to non-existent. Houston thus decided she needed an "edge" in the child-support war.

31. Defendant Houston, employing her grateful and gullible "buddy" Katie in her plans, implemented an all-too-common scheme that almost destroyed

Plaintiff's life. The motives for this scheme by Houston and Katie were as old as mankind itself: greed and revenge.

32. Houston devised that if she made sufficiently-egregious accusations of criminal behavior against Plaintiff, then Plaintiff would be willing to acquiesce to her unreasonable demands for child support monies, and Houston could thereby avoid a court showdown at which she would likely have not received the full amount of child support she was seeking, if indeed she received any at all. The plan was to get Plaintiff to "surrender" the child-support battle before the first shot was fired in court. However, since Plaintiff had no criminal record and engaged in no illegal or immoral activities, Houston did not have the type of ammunition that would be sufficiently devastating to scare Plaintiff into submission.

33. Defendant Katie, due in no small measure to her decadent, mother–approved lifestyle, had naturally been having severe psychological problems. She had been diagnosed with bi–polar disorder, was becoming a consummate liar, was frequently under the influence of illegal drugs, suffered depression, was sexually promiscuous, and had serious problems with authority.

34. In May 2004, Katie attempted suicide following her breakup with a boyfriend. The breakup was precipitated by the boyfriend's discovery of Katie's sexual infidelity. Supposedly distraught at the breakup, and compounded by her other psychological problems, Katie attempted to take her own life by ingesting a large quantity of prescription drugs.

35. On July 14, 2004, Katie was arrested for shoplifting. On the day she was arrested for shoplifting, Katie again allegedly tried to commit suicide, this time by slashing her wrists with a knife.

36. Given her emotional condition and recent legal problems, Katie would prove the perfect tool for Houston's use in concocting her plot to destroy Plaintiff and thereby "win" the child-support battle.

The Defendants' Nefarious Scheme is Hatched.

37. During an alleged struggle to wrest the alleged suicide knife from Katie on July 14, 2004, Katie allegedly told her mother that Plaintiff had sexually molested her when Katie was either six or eight years old. In truth, either Houston convinced Katie to fabricate this story of alleged sexual abuse against Plaintiff to support the child-support battle plan, or Katie herself fabricated the story of the alleged molestation in order to deflect attention away from her shoplifting incident.

38. Even if Katie made up the accusation of abuse on her own without Houston's prompting, which is unlikely, Houston had literally no reason to believe Katie's story and many credible reasons to not believe it. However, Houston believed that such infamous charges, and the criminal liability such charges entailed, would be sufficient to bludgeon Plaintiff into submission in the child-support fight. Houston also hoped such charges would destroy Plaintiff's life, and thus exact revenge on Plaintiff for his criticism of her lifestyle and for any other imagined harms which Plaintiff had supposedly inflicted on Houston during and following their marriage. Houston's motives in

reporting this fabricated instance of "child sexual abuse" to authorities thus exhibited the most extraordinary and diabolical bad faith.

Denton County CPS Becomes Involved.

39. Houston first brought the false charges of child sexual assault to the Denton County, Texas office of Child Protective Services (CPS) on July 14 or 15, 2004, where she filed a formal complaint against Plaintiff accusing him of raping Katie.

40. At the time of this report, Katie was 16 years old.

41. Depending on which report is credited, this alleged abuse began when Katie was either six, eight, or nine years old and continued until Katie was twelve or so. No charges were made of continuing or more-recent abuse or harm.

42. This complaint was supported with Katie's affidavit or statement, which document was obviously not authored by Katie but by someone else—probably Houston.

43. Katie's affidavit or statement filed with the CPS charge was full of lies, including that Katie had not seen her father in over four years, when in fact, Plaintiff had seen Katie and recently purchased a car for Katie in January 2004.

44. Denton County CPS officials conducted an investigation into the charges. However, they did not fulfill their statutory duties to interview or notify Plaintiff (statutes require that CPS notify Plaintiff of

the charges and the progress of the case since he is the accused and because he is the father of the complaining witness/child). This failure to notify and interview Plaintiff was not merely a violation of state law, but would play itself out badly for Plaintiff in the police action and prosecution which soon followed in Collin County.

45. On July 30, 2004, Denton County CPS workers forwarded to Defendant Jose Quiles, an officer serving with and employed by the McKinney, Texas police force, a videotape of a "forensic interview" with Defendant Katie that had been conducted by CPS investigator Dawn Wells on July 21, 2004. No formal criminal charges were filed against Plaintiff at this time. The exact contents of this videotape interview are presently unknown to Plaintiff, but given that CPS dropped its investigation shortly after this videotape was made with the notation "unable to determine," one can surmise that the tape does not contain any credible evidence supporting charges of sexual or other abuse by Plaintiff. Although he received the tape on July 30, 2004, Defendant Quiles for some reason did not review the videotape interview until August 9, 2004.

The McKinney Police Weigh In.

46. On August 12, 2004, apparently dissatisfied with the speed and effect with which Denton County CPS was proceeding with its investigation, Houston gave McKinney police a voluntary statement and filed a formal criminal complaint against Plaintiff accusing him of child sexual assault of Katie.

47. The complaint filed by Houston falsely accused Plaintiff of child sexual abuse. Houston also falsely and scurrilously claimed that Plaintiff was "an alcoholic and a flight or suicidal (sic) risk."

48. An investigation was undertaken by Defendant Quiles, and perhaps by the John Doe Defendants, of the charges levied against Plaintiff by Houston. This investigation included a statutory SANE inquiry, which was conducted over the objections of Houston, and a sexual-assault examination of Katie by a registered nurse. However, the investigation did not include any investigation into the trustworthiness or reliability of Houston or Katie as witnesses.

49. Plaintiff does not presently know exactly when this complaint by Houston first came to the attention of Defendant Quiles. However, Defendant Quiles apparently accepted every allegation made by Houston at face value, even though he had no independent corroboration of any of the allegations made therein and even though the entire investigation pointed toward the falsity of the charges.

50. On August 26, 2004, Defendant Quiles received a registered nurse's affidavit relating to the physical examination of Defendant Katie, which refuted the possibility of any alleged sexual assault on Katie when she was a small child or at any other time.

51. On September 2, 2004, Defendant Quiles received the SANE report on Katie, which was "normal," indicating that no signs of sexual assault or trauma—past or present—were noted.

52. Upon information and belief, Defendant Quiles had no contact with Houston or Katie prior to the complaint being filed in August 2004, and he made no investigation into the past history of informants Houston or Katie or their relationship with Plaintiff.

53. Had any reasonable officer in Defendant Quiles's position investigated and learned the facts concerning (a) the child-support battle then pending, (b) Katie's disturbed emotional condition and propensity to lie, (c) the exonerating physical evidence then available, and (d) the improper financial motivations of Houston and Katie, that officer would never have believed, under the totality of the circumstances, that he had probable cause or legal justification to arrest Plaintiff.

54. Defendant Quiles thus knew or should have known that he had no reasonable basis to believe Houston and Katie were trustworthy or reliable, and as a matter of law could not base his request for an arrest warrant on their statements or information they provided.

55. On September 8 or 9, 2004, utterly ignoring the totality of the circumstances, including all of the extrinsic, third-party evidence indicating that no sexual assault had occurred as alleged and without investigation or inquiry into the reliability or trustworthiness of the informants, without interviewing Plaintiff, and without making any further investigation into the charges, Defendant Quiles swore out an affidavit and applied for an arrest warrant for Plaintiff, stating in that affidavit: "Based on the above information and investigation, Affiant [Quiles] has reason to believe, and does believe, that [Plaintiff] has

committed the offense of Aggravated Sexual Assault of a Child F-1 as defined in the Texas Penal Code, against the Peace and Dignity of the State."

56. Pointedly, in his Affidavit Defendant Quiles *listed* the CPS Case Report, the forensic videotape, and the report of the registered nurse, but neglected to tell the magistrate issuing the warrant that the videotape, the nurse's report, the CPS Case Report, and the SANE report (which Quiles did NOT list in his affidavit but which had been in his possession since 9/2/04) all provided ***exculpatory*** evidence which tended to make the allegations of abuse highly suspect if not provably false.

57. Defendant Quiles had no probable cause, legal justification, or even reasonable suspicion to believe a crime had been committed by the Plaintiff. Thus, Defendant Quiles had no basis to believe the arrest warrant was proper or to request the arrest warrant under the totality of the circumstances.

58. By not mentioning or listing the SANE report in his Affidavit, Defendant Quiles falsely stated or implied in his Affidavit that the SANE report on Katie was not available on September 8, 2005. Instead, he falsely stated that "no other records [other than the RN's affidavit] are applicable since [Katie] was a voluntary commitment. A SANE examination is scheduled for [Katie] on 09-01-04." This false statement was obviously designed and intended to keep secret from the magistrate the existence of this exonerating evidence, and was intentionally misleading at best.

59. In the CPS case summary all participants—including Defendant Curtis Howard, the SANE nurse, and Case Worker Dawn Todd—are quoted as doubting Katie's story of sexual abuse due to inherent inconsistencies in, and the utter implausibility of, the story being told. This information was also not revealed to the magistrate by Defendant Quiles when he obtained the arrest warrant.

60. When Defendant Quiles went to obtain the arrest warrant for Plaintiff, he had in his possession the questionable accusation of the complaining witness (Katie, whom he knew or should have known to be a very disturbed young woman prone to lying and with strong motives to do so), the hearsay report of Houston (whom he knew or should have known was a bitter ex-wife currently involved in a contentious child-support dispute with Plaintiff), and mountains of exonerating evidence provided by the only objective, third-parties involved, including the written report of a licensed nurse, the written SANE report, the written CPS case summary, the personal suspicions of Defendant Howard, CPS worker Dawn Todd, and perhaps others, and/or the dismissal (or imminent dismissal) for lack of evidence of identical charges pending with Denton County CPS.

61. The totality of the circumstances known to Defendant Quiles thus showed that the charges against Plaintiff were false.

62. All evidence which tended to exonerate Plaintiff or which caste doubt on his guilt was negligently, intentionally, or recklessly withheld from the magistrate by Defendant Quiles.

63. No reasonable magistrate would have issued an arrest warrant for Plaintiff if all relevant evidence and information had been provided to the magistrate by Defendant Quiles, and Defendant Quiles knew this when he applied for the warrant. Defendant Quiles's judicial deception was therefore intentional and was the "but for" cause of the warrant being issued.

64. Defendant Quiles obtained an arrest warrant for Plaintiff on September 9, 2004 when he did not have probable cause to believe an offense had been committed, without the benefit of a full investigation, and/or by negligent or reckless omission of material facts, all of which undoubtedly influenced the magistrate's decision on whether to find probable cause and whether to issue the arrest warrant. Defendant Quiles thus committed negligent judicial deception.

65. In the alternative, Defendant Quiles knew about and intentionally withheld this information from the magistrate in order to avoid the chance that the magistrate would deny his application for a warrant as lacking probable cause, and thus committed intentional judicial deception.

66. It is clear that Defendant Quiles either intentionally, negligently, or recklessly omitted this exonerating evidence from the materials presented to the magistrate in pursuit of the arrest warrant. Instead, Quiles merely mentioned the *existence* of only some of the documents, and he did not tell the magistrate anything about their (exculpatory) content, so as to knowingly give the false impression that they "supported" the warrant.

67. Upon information and belief, at no time did Defendant Quiles tell the magistrate about the credible, unimpeached, exonerating, disinterested-third-party evidence which existed in the files of Defendants Quiles and the City of McKinney, and which provided more-than-sufficient proof that the charges made against Plaintiff by Houston and Katie were wholly fabricated, or at the very least, not supported by any facts, and thus called into question the probable cause or legal justification necessary for issuance of an arrest warrant.

68. No reasonably prudent police officer in the position of Defendant Quiles, in the same or similar circumstances and possessing the same facts within Defendant Quiles's knowledge and of which he had reasonably trustworthy information, could have believed that any sexual assault had occurred as alleged, and therefore, any reasonably prudent officer in Quiles' position would not have believed his actions were justified, to wit: he would not have believed under the totality of the circumstances that he had probable cause or legal justification to arrest, he would not have sworn out an affidavit, he would not have pursued an arrest warrant, and he would not have arrested Plaintiff.

69. These actions by Defendant Quiles, including exercise of his personal deliberation, decision-making, and judgment, were undertaken in bad faith.

70. Defendant Quiles, in obtaining the arrest warrant, violated Plaintiff's U.S. clearly-established constitutional rights to be free from unreasonable searches and seizures, his actions demonstrate deliberate indifference to Plaintiff's clearly-established

constitutional rights, and he acted objectively unreasonably in light of clearly established law at the time the warrant was obtained, and he had fair warning that he was violating clearly-established law.

71. On September 10, 2004, Denton County CPS dropped its investigation against Plaintiff finding no cause to believe the charges were real, with the notation "unable to determine." Upon information and belief, Denton County CPS notified the District Attorney Defendants and/or Defendant Quiles of this action on or near that date. However, once again, Defendant Quiles either intentionally or recklessly failed to inform the District Attorney's office of this very relevant action by CPS, and/or the District Attorney's office failed to so inform the magistrate.

72. Upon information and belief, Defendant Quiles did not tell the magistrate about the exonerating evidence in their possession, and failed to include known facts that were clearly critical to the probable-cause determination, and thus illegally influenced the judge's decision whether to issue the warrant. This deliberate concealing of exculpatory evidence by Defendant Quiles tends to prove that the procuring of the warrant and subsequent arrest of Plaintiff, in addition to being violative of Texas statutory law and the state and federal due process rights of the Plaintiff, were motivated by personal animosity, malice, and glaring bad faith.

73. **Policies.** Upon information and belief, Defendant City of McKinney has special customs, policies, practices, procedures, or rules which guide McKinney city police officers in matters relating to

investigation of criminal complaints and securing arrest warrants based on probable cause.

74. Plaintiff asserts that these customs, policies, practices, procedures, or rules compel or require unconstitutional action, which action executes or implements a policy or a decision officially adopted or promulgated by those whose acts may fairly be said to represent or implement the official policy of the City of McKinney.

75. **No Policies.** In the alternative, Defendant City of McKinney does not have any customs, policies, practices, procedures, or rules governing the conduct of McKinney city police officers in such matters, and thus has failed and refused to provide a proper training and environment in which city police-department employees may learn, know, and practice actions that do not violate the clearly-established constitutional rights of citizens with whom they come in contact.

76. City of McKinney policymakers know that police officers are routinely called upon to arrest criminal suspects, and that many or most such arrests proceed based on warrants that police officers obtain from magistrate judges. Thus, the need to train police officers in the proper methods of obtaining such warrants is so obvious that failure to do so can properly be characterized as deliberate indifference to clearly-established constitutional rights.

77. Defendant City of McKinney failed to train its police officers, including Defendant Quiles, in the proper methods and procedures for obtaining arrest warrants, which failure to train amounts to deliberate

indifference toward the civil rights of persons with whom the police come into contact to the point where the City's failure can be seen as a city policy or custom.

78. Plaintiff asserts that such special customs, policies, practices, procedures, or rules—or the deliberately indifferent, customary failure to establish or neglect in enforcing proper customs, policies, practices, procedures, and rules—lead directly to, or played a part in, the violations of law described herein, to wit:

(A) failure or refusal to provide all relevant information to magistrates issuing arrest warrants, including information not supportive of probable cause;

(B) inept or non-existent investigation of citizen complaints;

(C) inability to investigate or determine the credibility or reliability of informants, or of the information provided by informants;

(D) judicial deception in applying for and securing arrest warrants without probable cause, and

(E) failure or refusal to supplement information obtained following issuance of arrest warrants if said information casts doubt on the propriety of the warrant,

all in violation of the clearly-established Constitutional and statutory rights of persons accused of crimes in Collin County, including the Plaintiff.

79. The harm Plaintiff suffered in this case was an obvious consequence of, and proximately caused by, the existence of, and compliance with, the aforesaid customs, policies, practices, procedures, or rules by the Defendants, or some of them.

80. **Policies Routinely Ignored.** In the further alternative, even if the City of McKinney has adequate policies and procedures relating to these activities, McKinney police officers routinely and habitually violate such policies and procedures, and supervisory personnel in the department and City policymakers know of such routine violations of department policies and procedures and routinely "look the other way" and impart no discipline or inadequate discipline, when such violations occur to the point where it can be said that the actual custom and practice of the City of McKinney is to neglect or refuse to enforce written policies and procedures already on the books. This systematic maladministration of written rules is approved, acquiesced, or encouraged by City of McKinney policymakers and supervisory personnel and, hence, by the City of McKinney itself.

The Warrant is Served and Arrest Accomplished.

81. McKinney police, including Defendant Quiles and the John Doe Defendants, served and executed the September 9, 2004 arrest warrant on September 12, 2004—two days ***following*** the dismissal of all charges by Denton County CPS[1] Plaintiff was arrested at his

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[1] Plaintiff does not presently recall if Officer Jose Quiles was physically present at the time of the arrest. He recalls there were

home and booked on first-degree felony charges that day. He bonded out shortly after his arrest.

82. During the arrest, Defendants Quiles and the John Doe Defendants interviewed and spoke with Brian Quinn who told them that the charges against his father were totally false, that they had been fabricated by his mother and sister, and that his father was innocent. The police officers ignored Brian's statement and proceeded with the arrest in spite of this *additional* exonerating evidence—evidence wholly consistent with the other voluminous, exonerating evidence available to the police.

83. Due to his not being informed of the existence, progress, or dismissal of the Denton County CPS investigation, the registered nurse's findings, or the SANE report, Plaintiff was unable to effectively counter his alleged culpability using this exonerating information until much later, following Freedom of Information Act requests that were successfully contested (in part) by McKinney police and/or the Collin County District Attorney's office, and thus were not even partially fulfilled until September 2005. Even now, these FOIA requests have not been completely fulfilled at the date of this Second Amended Complaint due to continuing opposition by the Collin County District Attorney's office or others.

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five male and one female officer present. Discovery should reveal the exact identities of the arresting officers. Plaintiff reserves the right to amend this Complaint, if appropriate, to name additional defendants once this discovery has been done.

84. Plaintiff is still attempting to obtain full information and complete records from governmental agencies, including Denton County CPS, the Collin County District Attorney's office, and McKinney police, who have to date refused Plaintiff's requests to voluntarily produce those records. The prosecution's failure to provide, or suppression of, evidence favorable to Plaintiff violates not only Plaintiff's clearly-established statutory rights, but his clearly-established constitutional rights to due process under the U.S. constitution as well.

85. Upon information and belief, Defendants are refusing to comply with these requests because the information sought contains additional evidence proving malice, official incompetence, and the perhaps-intentional and thus potentially-career-ending violation of Plaintiff's clearly-established constitutional rights by the Defendants.

86. Even though the Denton County CPS investigation was not dismissed until September 10, 2004, Defendant Quiles did not go back to the court before executing the warrant on September 12, 2004 for a re-evaluation of probable cause in light of this exonerating evidence in spite of his legal obligation to do so.

87. Even if the warrant could be seen as properly **obtained** on September 9, 2004—which it cannot—Defendant Quiles intentionally or recklessly **executed** the warrant at a time (September 12, 2004) when the sole credible information even arguably "supporting" the charges—an active CPS investigation—was no longer viable. On the date the warrant was executed, there was no longer any

probable cause to believe the charges were legitimate, and the arrest should never have occurred and would never have occurred if reasonable state actors had been involved and doing their job correctly.

The District Attorney's Unlawful Delays Following the Arrest.

88. The Collin County District Attorney's office handled Defendant Quiles' police report/affidavit and Houston's 8/12/04 complaint following Plaintiff's arrest.

89. No investigation of the charges against Plaintiff was ever conducted by Defendant Quiles, the District Attorney Defendants, or anyone else following Plaintiff's arrest. In the alternative, any such investigation quickly and conclusively revealed that the charges against Plaintiff were specious and wholly without merit, but the charges were nevertheless not dismissed.

90. In handling the police report and complaint, the District Attorney Defendants knew about, and had full access to, not only the police report, Houston's statement, and Katie's affidavit/statement, but also to the Denton County CPS report dated September 10, 2004 dismissing the identical charges made against Plaintiff as lacking merit, the registered nurse's report showing no abuse had occurred, the SANE report showing no abuse had occurred, and the statement of Brian Quinn taken at the time of Plaintiff's arrest which informed officials that the abuse charges were fabricated and Plaintiff was innocent.

91. The District Attorney Defendants performed no investigation or inquiry into the reliability or trustworthiness of informants Houston and Katie at any time.

92. Controlling Texas state law requires district attorneys to pursue justice, not merely convictions, and they are expressly prohibited by statute from suppressing evidence capable of establishing the innocence of accused persons. Texas Code of Criminal Procedure, Chapter 2, §2.01 provides:

> It shall be the primary duty of all prosecuting attorneys, including special prosecutors, not to convict, but to see that justice is done. They shall not suppress facts or secrete witnesses capable of establishing the innocence of the accused.

93. The District Attorney Defendants intentionally and knowingly ignored and violated Texas Code of Criminal Procedure §2.01, and failed and refused to dismiss the charges against the Plaintiff as soon as they became aware that there was no proof supporting the charges. This obligation was mandatory, and not within the discretion of the District Attorney Defendants.

94. The actions of the District Attorney Defendants, including exercise of their personal deliberation, decision-making, and judgment, were undertaken in bad faith.

95. Rather than drop the charges, the District Attorney Defendants instead delayed disposition of the charges and failed and refused to bring the charges to

the Collin County Grand Jury for over 15 months, during which time Plaintiff languished in the netherworld of "pending criminal prosecution" on the most heinous, infamous, reputation-destroying criminal charge known to mankind.

96. There is no lawful or just cause or excuse for this failure to investigate and subsequent delay by the District Attorney Defendants. Indeed, this delay violated clearly-established, controlling state law and the Plaintiff's clearly-established constitutional rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution to be free from unreasonable seizure and unlawful prosecution, and to enjoy procedural and substantive due process, equal protection, speedy trial, and governmental compliance with controlling law.

97. Texas Code of Criminal Procedure §32.01 provides as follows:

> When a defendant has been detained in custody or held to bail for his appearance to answer any criminal accusation, the prosecution, unless otherwise ordered by the court, for good cause shown, supported by affidavit, shall be dismissed and the bail discharged, if indictment or information be not presented against such defendant on or before the last day of the next term of the court which is held after his commitment or admission to bail or on or before the 180th day after the date of commitment or admission to bail, whichever date is later.

98. It is a mandatory obligation for Texas state prosecutors, such as the District Attorney Defendants,

to strictly comply with Texas Code of Criminal Procedure §32.01.

99. In Collin County, grand juries sit for terms of six months beginning on January 1 and July 1 of each year. Therefore, the "next term of the court" following Plaintiff's arrest on September 12, 2004 would have begun—**at the latest**—on January 1, 2005 and ended on June 30, 2005. However, Plaintiff's case was not brought to the Collin County grand jury until January 2006, which was seven months **after** the last possible date upon which the statute allowed it to be so brought.

100. The District Attorney Defendants thus intentionally and knowingly ignored and violated Texas Code of Criminal Procedure §32.01, and failed and refused to take required administrative action to either dismiss the charges against Plaintiff or bring those charges to the Collin County grand jury for resolution within the time period required by state law. This obligation was mandatory, was an administrative function, and was not within the discretion of the District Attorney Defendants.

101. In the alternative, if discretionary, the District Attorney Defendant's actions in delaying prosecution were not objectively reasonable in light of then clearly established law, and they had fair warning that they were violating clearly-established law.

102. Defendant Roach is and was the duly-elected District Attorney for Collin County, Texas at all times relevant to this case.

103. Defendant Roach is and was the policy maker for the Collin County District Attorney's office, and/or is one whose edicts or acts may fairly be said to represent the official policy of Collin County relating to all phases of the investigation and prosecution of crimes in Collin County.

104. Defendant Roach is and was a person whose actions and statements establish governmental policy in and for Collin County, Texas.

105. Defendant Roach is and was statutorily responsible for the conduct of employees of the District Attorney's office, including hiring, training, supervising, and disciplining the employees of that office, who included the other District Attorney Defendants.

106. Defendant Roach and his subordinates have engaged in a custom, practice, and pattern of improperly hiring, failing to train, inadequately supervising, and improperly disciplining or failing to discipline assistant district attorneys for violations of state law which amounts to a deliberate indifference to the clearly-established rights of persons with whom that office comes into contact, including Plaintiff.

107. Defendant Roach participated in, acquiesced to, or ratified the common-law, statutory, and Constitutional violations committed by the District Attorney Defendants described herein. Specifically, Defendant Roach knew about, facilitated, condoned, approved, or "turned a blind eye for fear of what he might see" toward the conduct of the District Attorney Defendants described herein, which caused, facilitated, and/or contributed to the violation of Plaintiff's

clearly-established common-law, statutory, and constitutional rights.

108. **Policies.** Upon information and belief, Defendant Collin County has special customs, policies, practices, procedures, or rules which guide the Collin County District Attorney and employees of that office in matters relating to criminal complaints involving child sex crimes, and compliance with these special customs, policies, practices, procedures, or rules lead directly to the violations of Plaintiff's clearly-established constitutional rights detailed herein.

109. Plaintiff asserts that these customs, policies, practices, procedures, or rules compel or require unconstitutional action, which action executes or implements a policy or a decision officially adopted or promulgated by those whose acts may fairly be said to represent or implement the official policy of Collin County.

110. **No Policies.** In the alternative, Defendant Collin County should have, but does not have, any customs, policies, practices, procedures, or rules governing the conduct of its district attorneys in such matters, and thus has failed and refused to adopt policies that would have provided a proper environment in which county officials and employees may learn, know, and practice actions that do not violate the Constitutional rights of citizens with whom they come in contact, and Collin County knew the likely consequences of failure to adopt such policies would be deprivation of civil rights.

111. Plaintiff asserts that such special customs, policies, practices, procedures, or rules—or the deliberately indifferent failure to establish or neglect in enforcing proper customs, policies, practices, procedures, and rules—lead directly to, or played a part in, the violations of law described herein, to wit:

(A) inept or non-existent investigation of citizen complaints;

(B) failure or refusal to supplement information obtained following arrest if said information casts doubt on the propriety of the arrest, and

(C) failure or refusal to comply with state laws requiring prosecution or dismissal of actions within a fixed time period,

all in violation of the clearly-established constitutional and statutory rights of persons accused of crimes in Collin County, including the Plaintiff.

112. The harm Plaintiff suffered in this case was proximately caused by the existence of, and compliance with, the aforesaid customs, policies, practices, procedures, or rules by the Defendants, or some of them.

113. **Policies Routinely Ignored.** In the further alternative, even if Collin County has adequate policies and procedures relating to these activities, Defendant Roach and the District Attorney Defendants routinely and habitually violate such policies and procedures, and supervisory personnel in the district attorney's office, including Defendant Roach, know of such routine violations of official policies and

procedures and routinely "look the other way" and impart no discipline or inadequate discipline, when such violations occur to the point where it can be said that the actual custom of Collin County is to neglect or refuse to enforce written policies and procedures already on the books. This systematic maladministration of written rules is approved, acquiesced, ratified, or encouraged by Collin County policymakers and supervisory personnel (including Defendant Roach) and, hence, by Collin County itself.

114. Plaintiff asserts that the harm he suffered in this case was proximately caused by the routine and habitual failure to comply with the aforesaid customs, policies, practices, procedures, or rules by the District Attorney Defendants, or some of them, and this unconstitutional action executes or implements a policy or a decision officially adopted or promulgated by those whose acts may fairly be said to represent official policy in Collin County.

115. Plaintiff asserts that Collin County and Defendant Roach do not and did not adequately train or supervise Collin County's assistant district attorneys regarding the state-law requirements of fair and diligent prosecution, including compliance with Texas Code of Criminal Procedure §§2.01 and 32.01, and this failure to train amounts to deliberate indifference toward the clearly-established Constitutional rights of persons in the domain of Collin County, including Plaintiff.

116. Plaintiff asserts that this customary or policy-based lack of training is supported by the fact that at least five separate assistant district attorneys all identically failed to obey the law in exactly the

same manner, which further demonstrates and proves negligence, deliberate indifference, and reckless disregard by the District Attorney Defendants toward the clearly-established constitutional and statutory rights of persons accused of crimes in Collin County, including Plaintiff.

117. Upon information and belief, the District Attorney Defendants have not suffered or been given any discipline, punishment, or other negative consequences from their actions described in this suit.

118. Plaintiff asserts that the statutory and Constitutional rules and laws described herein as having been violated by the District Attorney Defendants were well-known and clearly-established in 2004, and any reasonable person in the position of the District Attorney Defendants would have known about and obeyed these well-known and clearly-established rules and laws.

119. In light of such customs, policies, practices, procedures, and rules, and in light of the existence of express statutes purposefully designed to ensure fair prosecution and to prevent inordinate delays in prosecutions and the consequent harm of such actions, Plaintiff asserts that the conduct of the District Attorney Defendants was allowed and enabled by the deliberate indifference of Collin County and Defendant Roach to prevent such occurrences and abuses.

Defendants Have No Immunity.

120. Plaintiff asserts that Defendant Quiles does not have any immunity due to his judicial deception and his reckless or intentional failure to bring

exonerating evidence to the attention of the magistrate or the court after he obtained it.

121. Plaintiff asserts that the District Attorney Defendants do not have any immunity due to their violation of Texas Code of Criminal Procedure §§2.01 and 32.01, intentional failure to take reasonable precautions to avoid harm to Plaintiff, and because their actions complained of herein were non-judicial and administrative in function and not part of the advocacy of their office before a court of law.

122. None of the Defendants are protected by sovereign immunity, which is only afforded to states under the U.S. Constitution, 11th Amendment.

123. Neither Collin County nor the City of McKinney have any form of immunity recognized under law or, in the alternative, it has been waived.

124. There is no immunity for requests for injunctive relief.

125. To the extent necessary, and in the alternative, Plaintiff asserts that governmental or official immunity, if any, the Defendants that might otherwise enjoy has been statutorily waived by Texas Civil Practice & Remedies Code §§101.021, 101.025, and 101.0215 for the state-law claims made herein (i.e., negligence, false arrest/detention, and malicious prosecution), and that no such waiver is necessary for the federal causes of action under 42 U.S.C. §1983.

126. Neither of the Family Defendants have any form of immunity recognized under law.

The Plaintiff's Harm and His Efforts to Avoid Harm.

127. Plaintiff has been unable to obtain his ordinary form of employment because applications for the work he does require that job applicants disclose whether they have ever been arrested.

128. For this reason, the unlawful arrest of Plaintiff has negatively impacted, and will continue to negatively impact in the future, his ability to obtain employment, in that he must now **and forever** inform potential employers that he was previously arrested for a felony—and not just *any* felony, but child sexual assault of his own daughter, a crime more heinous and infamous than kidnaping, murder, and treason put together. This unfortunate situation will haunt Plaintiff for the rest of his natural life, and creates a stain on his personal and professional reputation incapable of remediation.

129. As just one example from the recent past showing Plaintiff's difficulties in obtaining employment, which example sadly foreshadows his future, Plaintiff found out when he was in the final stages of negotiation for and acceptance of a high-paying consulting job involving EDS that the company would not even *consider* his application as long as these criminal charges were pending.

130. Among the possible reasons for not hiring someone in Plaintiff's circumstance are (a) the public stigma that attaches to having an employee who has been accused of such an infamous charge, and (b) the very real probability that the employee's work might be interrupted in the immediate future—to the

detriment of the employer—due to his mental distractions and absence from work while engaged in discovery and preparing for and attending what could be an extensive criminal trial, not to mention the potentially-*permanent* interruption if convicted.

131. For this and other reasons, Plaintiff was understandably anxious to have the charges either dropped or brought to the grand jury for final resolution.

132. Following his arrest, Plaintiff's civil counsel, Mr. Mark Montgomery, and his criminal defense attorney, Mr. Paul Stuckle, both called the Collin County District Attorney's office repeatedly (often several times a month) for 15 months trying to get the issue resolved so Plaintiff could get on with his life.

133. Additionally, Plaintiff himself filed numerous written complaints relating to these issues with the Texas Department of Family and Protective Services, the Office of Governor Rick Perry, the Office of State Representative Ken Paxton, and Texas Attorney General Greg Abbott, all without success.

134. Plaintiff even took <u>two</u> lie detector tests, one using a professional recommended by the District Attorney's office, and passed both of them. This information was presented to the District Attorney Defendants without apparent effect.

135. All of these calls and pleas, and all of the objective, irrefutable evidence relating to the Plaintiff's innocence of the alleged crime—the pending child-support dispute, Katie's unfortunate, sociopathic condition, Brian's statement, the favorable lie-detector

tests, the CPS final report, and the nurse's and SANE reports—were known to, and utterly ignored by, the District Attorney Defendants.

136. When the telephone inquiries were made, the District Attorney's office personnel, including the District Attorney Defendants herein, or some of them, would make remarks during these calls attempting to explain the delay such as they were "very busy," or would say the file had been "transferred to a new assistant [district attorney]."

137. The prosecution's file apparently went through the hands of at least five different assistant district attorneys, including the District Attorney Defendants, during the 15-month-plus period in which the charges were pending against Plaintiff.

138. Frustrated and short on funds, Plaintiff filed a *pro se* application for writ of habeas corpus on December 14, 2005, in which he asked the District Court to dismiss the complaint. Subsequent to Plaintiff's filing for this writ, the District Attorney—then and only then—scheduled a Grand Jury hearing.

139. Through Plaintiff's attorney (Mr. Montgomery), the District Attorney Defendants attempted to dissuade Plaintiff from proceeding with the Writ of Habeas Corpus hearing, stating that while they could not promise anything, it was likely the case would be "no billed" at the upcoming Grand Jury hearing. Plaintiff refused this request to stand down, having found no reason to believe or trust the District Attorney Defendants after their outrageous treatment of Plaintiff for 15 months.

140. At the hearing on the petition for writ of habeas corpus, the District Attorney Defendants presented no evidence of probable cause to convict Plaintiff on any charges, and presented no "good cause" evidence to justify the delay in bringing the matter to the grand jury in blatant derogation of express state law requiring fair and timely action by their office.

141. The District Court granted Plaintiff's petition for writ of habeas corpus and dismissed the case by order dated January 6, 2006. Plaintiff was then released from bail.

142. A few days **after** the District Court dismissed the complaint, on or around January 10, 2006, the District Attorney Defendants finally took the case to the Collin County grand jury, and the grand jury issued a "no true bill" on the charges, exonerating the Plaintiff. This grand jury proceeding was merely a continuation of the criminal complaint that had already been ordered dismissed by the District Court on January 6, 2006, and thus was undertaken without legal cause and without a valid criminal charge then pending.

143. There are no known, present plans to bring any other complaints against Plaintiff, on this or any other charge.

144. Plaintiff incurred extensive legal fees and expenses due to the filing of false criminal charges and the illegal and inordinate delays of the District Attorney Defendants prior to the filing of this Complaint in the amount of $30,000.00. Plaintiff

continues to incur additional legal fees and expenses for prosecuting the instant action.

145. Plaintiff has suffered, and will in all likelihood continue to suffer, the loss of personal and business reputation, employment opportunities, and income due to the false arrest, malicious prosecution, and the 15-month delay in prosecution.

146. Plaintiff has suffered, and will in all likelihood continue to suffer, humiliation, extreme mental pain and suffering, and severe emotional distress due to the outrageous conduct of the Defendants.

147. Plaintiff suffered a partial nervous breakdown proximately caused by the conduct of the Defendants as described herein.

148. Plaintiff has suffered, and will in all likelihood continue to suffer for the foreseeable future, other manifestations of severe emotional distress such as sleeplessness, headaches including migraine headaches, nausea, confusion, lightheadedness, anxiety attacks, lost appetite, short-term memory loss, night sweats, inability to concentrate, insomnia, paranoia, uncharacteristic and uncontrollable outbursts of rage, uncontrollable crying, and debilitating depression. Plaintiff asserts that such distress was proximately caused by the conduct of the Defendants described herein.

149. Plaintiff has incurred approximately $12,000.00 in past medical expenses consisting of charges for psychiatric and psychological counseling, in-patient treatment and therapy, prescription

medications prescribed for his anxiety and mental distress, and other coincidental damages linked to his medical treatment such as travel expenses, all proximately caused by the conduct of the Defendants described herein.

150. Plaintiff will in all likelihood continue to suffer extreme mental anguish and will require continuing care by medical and mental health professionals, including counseling and therapeutic drug treatment, into the foreseeable future and in an amount not capable of precise determination at this time.

CAUSES OF ACTION

Violation of 42 U.S.C. §1983 (against all Defendants).

151. All factual allegations above are incorporated herein by reference.

152. The Family Defendants are considered "state actors" because they instigated and contributed to the violations of law by the other defendants in this case, and but for their active participation the other state-actor defendants would not have been in a position to violate Plaintiff's clearly-established constitutional rights.

153. Defendants' conduct occurred under color of law.

154. Defendants abused the power or position granted or allowed to them by state law.

155. Defendants' conduct violated Plaintiff's clearly-established constitutional rights to be free from unlawful seizure as protected by the Fourth Amendment to the U.S. Constitution.

156. Defendants' conduct violated Plaintiff's clearly-established constitutional right to a speedy trial as protected by the Sixth Amendment to the U.S. Constitution.

157. Defendants' conduct violated Plaintiff's clearly-established constitutional rights to substantive and procedural due process and equal protection of the laws as protected by the Fifth and Fourteenth Amendments to the U.S. Constitution.

158. Defendants' conduct violated clearly-established Texas state laws prohibiting malicious criminal prosecution.

159. District Attorney Defendants violated clearly-established Texas statutory law prohibiting delays in prosecution (Tex. Code Crim. Proc. §32.01) and relating to their duties as prosecutors (Tex. Code Crim. Proc. §2.01).

160. Defendants acted, or failed to act, with deliberate indifference to Plaintiff's clearly-established constitutional rights, and their conduct was not objectively reasonable in light of then clearly established law.

161. Defendants' conduct proximately caused actual damages to Plaintiff in the amounts of:

A. $12,000.00 for past medical costs;

B. $100,000.00 for estimated future medical costs;

C. $7,000,000.00 for mental anguish, loss of reputation, and humiliation;

D. $425,000.00 for lost income in the past;

E. $8,000,000.00 for estimated future lost income;

F. $8,000,000.00 for past pain and suffering;

G. $4,923,000.00 for future pain and suffering; and

H. $30,000.00 in past attorneys fees and expenses associated with the false arrest and malicious criminal prosecution;

equaling $28,490,000.00, for all of which Plaintiff hereby sues.

162. In addition, Defendants in their individual capacity and the Family Defendants engaged in conduct that shows reckless or callous indifference to Plaintiff's clearly-established Constitutional rights, which justifies the imposition of punitive damages in the highest amount allowed by law up to $25,000,000.00, for all of which Plaintiff hereby sues.

Malicious Prosecution (against Defendant Quiles and Family Defendants).

163. All factual allegations above are incorporated herein by reference.

164. Plaintiff asserts that a fraudulent criminal case was brought against him by Family Defendants

and Defendant Quiles; the prosecution was procured by Family Defendants and initiated by Defendant Quiles; the prosecution was terminated in favor of Plaintiff; there was no probable cause to justify his arrest or to instigate the prosecution; the Family Defendants and Defendant Quiles acted with malice in filing the charges or bringing about or continuing the prosecution; and Plaintiff was damaged as a result of the prosecution.

165. Family Defendants and Defendant Quiles have committed malicious prosecution under both state and federal law.

166. Plaintiff has suffered money damages in defending the malicious prosecution instigated by Family Defendants and Defendant Quiles, and has suffered mental anguish, humiliation, and loss of personal and business reputation proximately caused by the conduct of the Family Defendants and Defendant Quiles.

167. Plaintiff asserts that he has suffered actual damages in the amount of $28,490,000.00 proximately caused by this malicious prosecution, for all of which Plaintiff hereby sues.

168. Plaintiff also asserts that Defendants' conduct was malicious and carried out in bad faith such that an award of punitive damages is justified against these Defendants in the highest amount allowed by law up to $25,000,000.00, for all of which Plaintiff hereby sues.

False Arrest and False Detention/Imprisonment (against Defendant Quiles).

169. Defendant Quiles willfully detained Plaintiff, without Plaintiff's consent, and without authority of law. These actions were not undertaken in good faith, but were in fact taken without probable cause to arrest and with the express knowledge that no probable cause existed.

170. Such conduct by Defendant Quiles constitutes false arrest under Texas law.

171. Plaintiff asserts that he has suffered actual damages in the amount of $28,490,000.00 proximately caused by this false arrest and imprisonment, for all of which Plaintiff hereby sues.

Negligence and Negligence Per Se (against all Defendants).

172. All factual allegations above are incorporated herein by reference.

173. Plaintiff asserts that District Attorney Defendants, or some of them, breached clear legal duties found in Texas state law requiring them to take certain actions within a prescribed period of time (Tex.Code Crim.Proc. §32.01) and to avoid concealing exonerating evidence (Tex.Code Crim.Proc. §2.01).

174. Plaintiff asserts that District Attorney Defendants either knew or should have known these statutory requirements, or therefore conducted themselves in a manner demonstrating willful

ignorance of the requirements and thus breached the duty negligently.

175. Plaintiff further asserts that the negligence of District Attorney Defendants in breaching these duties violated state statutes expressly designed to protect persons in Plaintiff's position from exactly the type of harm Plaintiff experienced. The District Attorney Defendants' actions thus constitute negligence per se under Texas law.

176. Plaintiff asserts that Family Defendants and Defendant Quiles knew or should have known that the allegations of sexual abuse against Plaintiff were false, and thus criminal charges were filed and Plaintiff was arrested in violation of clearly-established Texas state law.

177. In the alternative, Plaintiff asserts that Family Defendants and Defendant Quiles made those charges against Plaintiff without a proper investigation, and therefore made the charges negligently or recklessly.

178. Plaintiff asserts that Texas state law makes it illegal to falsely accuse a person of a crime and to falsely file any statements with police or prosecutors with the intent to initiate an arrest or prosecution without proof or probable cause to believe a crime has actually been committed. Texas Penal Code §§37.08 – 37.10

179. Plaintiff asserts that the purpose of the statutes prohibiting making or using false criminal accusations is to prevent the exact type of harm suffered by Plaintiff herein. The acts of the Family

Defendants and Defendant Quiles thus constitute negligence per se under Texas law.

180. Defendants Collin County, the City of McKinney, and the District Attorney Defendants failed to adequately and properly train and supervise their employees, and thus committed negligent training and negligent supervision amounting to conscious and deliberate indifference to the rights of citizens, including Plaintiff, and Defendants failed to act in an objectively reasonable manner in light of then clearly established law.

181. Plaintiff asserts that these breaches of duty by all Defendants proximately caused Plaintiff to suffer actual damages in the amount of $28,490,00.00, for all of which Plaintiff hereby sues.

Gross Negligence (against all Defendants except City of McKinney and Collin County).

182. All factual allegations above are incorporated herein by reference.

183. Plaintiff asserts that the actions by the Defendants described herein were taken without just cause or excuse, and with the specific knowledge that they would cause substantial injury or harm to Plaintiff.

184. These actions, when viewed objectively from the standpoint of the actor at the time of their occurrence, involved an extreme degree of risk considering the probability and magnitude of the potential harm to others, and the Defendants had actual, subjective awareness of the risks involved, but

nevertheless proceeded with conscious indifference to the rights, safety, or welfare of Plaintiff.

185. The actions of the Defendants constitute malice and gross negligence or reckless or callous disregard for the rights and safety of Plaintiff.

186. Plaintiff asserts that these breaches of duty by the Defendants proximately caused Plaintiff to suffer actual damages in the amount of $28,490,00.00, for all of which Plaintiff hereby sues.

187. Plaintiff also asserts that Texas law allows the recovery of punitive damages from these Defendants in the amount of two times actual economic damages, or $17,134,000.00, for all of which Plaintiff hereby sues.

Intentional Infliction of Severe Mental Anguish (against Family Defendants).

188. All factual allegations above are incorporated herein by reference.

189. Plaintiff asserts that when Family Defendants brought false criminal charges against him, they did so maliciously, out of spite and animus, and with the intent to inflict severe emotional distress on Plaintiff.

190. Given the facts above, including the total lack of evidence and complete lack of probable cause to believe the alleged abuse ever occurred, along with the selfish financial motives possessed by Family Defendants to fabricate the alleged abuse, there does

not seem to be any basis for Family Defendants' actions other than malice and spite toward Plaintiff.

191. Plaintiff asserts that Family Defendants' actions were extreme and outrageous.

192. Plaintiff asserts that even though Family Defendants knew the extreme, harmful consequences of their actions against Plaintiff, Family Defendants, or either of them, nevertheless took those actions intentionally and with the intent to inflict severe emotional pain and mental anguish upon Plaintiff.

193. Plaintiff asserts that these actions by Family Defendants proximately caused actual damages to Plaintiff in the amount of $28,490,000.00, for all of which Plaintiff hereby prays.

194. Under Texas law, the tort of intentional infliction of severe mental anguish allows the court or jury to impose punitive damages against the liable defendants. Plaintiff therefore requests that the Family Defendants who are found by the jury to be liable for intentional infliction of severe mental anguish be ordered to pay to Plaintiff, jointly and severally, the sum of $17,134,000.00 in punitive damages as provided by Texas law.

Application for Permanent Injunctive Relief.

195. All factual allegations above are incorporated herein by reference.

196. Plaintiff asserts that unless injunctive relief as prayed for herein is ordered, Defendants Collin County, the City of McKinney, and the District

Attorney Defendants will continue to violate the law by failing to train, failing to supervise, failing to maintain and enforce policies and procedures designed to avoid infringement on the Constitutional rights of citizens, failing to provide exonerating evidence to magistrates and courts when seeking arrest warrants, and illegally delaying the prosecution of criminal complaints pending in their offices.

197. Injunctive relief is necessary because without it, persons charged with crimes, which may include Plaintiff, will continue to suffer irreparable harm due to the continuing legal violations by District Attorney Defendants based on the policies, practices, customs, procedures or rules, or lack thereof, or lack of enforcement thereof, by their employer, Collin County, Texas.

198. Injunctive relief is necessary because without it, persons charged with crimes, which may include Plaintiff, will continue to suffer irreparable harm due to the continuing legal violations by McKinney police officers based on the policies, practices, customs, procedures or rules, or lack thereof, or lack of enforcement thereof, by their employer, the City of McKinney, Texas.

199. Injunctive relief is necessary because there is no other adequate remedy at law available to effect the same or substantially similar results that will be obtained through injunctive relief; the balance of harms between the parties favors entering the injunction; and entry of the injunction will not harm, and will in fact benefit, the public interest.

200. Injunctive relief is proper in this instance, even though Plaintiff is not presently subject to immediate Constitutional infringement, because the issue requiring injunctive relief is an issue capable of repetition but evading review; the post-hoc award of money damages in each individual case is an inadequate remedy because citizens caught in the process described herein are always released from custody and their cases dismissed by the time they have a cause of action capable of effecting the appropriate injunctive relief, and money damages or other legal relief can never fully compensate said citizens for the economic and non-economic harms suffered. Under these circumstances, an injunction is appropriate under federal law.

201. In order to prevent further failures to train and repetition of the illegal delays and withholding of relevant evidence by Defendant Quiles and the District Attorney Defendants, this Honorable Court should issue an injunction against the City of McKinney and Collin County, Texas prohibiting all police officers in the City of McKinney and all Collin County district attorneys from continuing to engage in this type of behavior, and negating and ordering stricken any and all the customs, policies, practices, or procedures of the City of McKinney and Collin County, if any, that routinely cause such judicial deception and illegal delays in prosecution, in all future cases.

202. Plaintiff therefore requests that the Court issue a permanent injunction requiring Collin County, Texas, the City of McKinney, Texas, and the District Attorney Defendants to:

(a) abrogate, dissolve, and remove any custom, policy, practice, procedure, or rule in which their employees are ordered or allowed to delay the bringing of criminal charges to a grand jury outside the statutory time limits for such action;
(b) abrogate, dissolve, and remove any custom, policy, practice, procedure, or rule of the City of McKinney or Collin County in which persons holding the position of police officer, district attorney, or assistant district attorney are encouraged, allowed, promoted, rewarded, or condoned for the withholding or secreting of relevant, exculpatory evidence from courts or magistrates during applications for arrest warrants;
(c) requiring all Collin County assistant district attorneys henceforth to either present all criminal charges to a grand jury or dismiss same within the statutory time frame required by Texas Code of Criminal Procedure §32.01; and
(d) requiring all City of McKinney police officers henceforth, at the time of making any application for an arrest warrant, to provide to the magistrate who is being asked to issue the warrant all tangible evidence bearing on the probable cause for the arrest, including without limitation, all evidence which (i) tends to disprove probable cause, (ii) which tends to prove that the target(s) of the warrant may not be guilty of the offense charged, or (iii) which consists of copies of written reports, statements, affidavits, or other documents relating to the target(s) of the warrant or the charges of criminal action brought against the target(s).

203. Plaintiff prays that a permanent injunction issue in this matter without the requirement of any bond by Plaintiff.

Attorney's Fees in This Action.

204. All factual and legal allegations above are incorporated herein by reference.

205. Plaintiff is entitled to recover a reasonable attorney's fee from the Defendants in this case in accordance with 42 U.S.C. §1988, under Texas state law as part of Plaintiff's damages incurred in his defense of the malicious prosecution inflicted upon him, and other applicable law, for all of which Plaintiff hereby sues. The exact amount of all such fees is presently unknown, is increasing with the passage of time, and the full amount of such fees will be presented to the Court at the appropriate time.

CONCLUSION AND PRAYER

Plaintiff prays that the Court issue process and require that all Defendants appear and answer herein; that upon final trial or other disposition of this case, Plaintiff recover of and from all Defendants the relief prayed for herein, including actual and punitive damages, temporary and permanent injunctive relief, attorneys' fees, costs of court, and pre-judgment and post-judgment interest, all at the highest lawful rates and amounts. Plaintiff also prays for such other and further relief as is just.

Dated June 12, 2006.

Respectfully submitted,

/s/_____

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* * *

[Certificate of Service Omitted in Printing of this Appendix]

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No. 09-252

Supreme Court, U.S.
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NOV 20 2009
OFFICE OF THE CLERK

In The Supreme Court of the United States

JOHN GERARD QUINN,

Petitioner,

v.

JOHN ROACH, GAIL LEYKO, MANUEL GONZALES, CURTIS HOWARD, KRISTI TYLER, MICHELLE VOIRON, JOSE QUILES, COLLIN COUNTY, TEXAS, AND THE CITY OF MCKINNEY, TEXAS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in light of the numerous and inexcusable misrepresentations of the record by Petitioner and the lack of significant issues of law presented by this case, this Court should waste its limited resources by granting Petitioner's request to review the unanimous, unpublished opinion of the Fifth Circuit.

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SUMMARY

This case raises no new issues regarding the application of the Fourth Amendment or qualified immunity. Twenty judges have had the opportunity to review Officer Quiles' conduct and the warrant that led to Petitioner's arrest and none of them have concluded that Petitioner's Fourth Amendment rights were violated or that Officer Quiles' conduct violated clearly established law.

The state court magistrate held that there was probable cause to arrest Petitioner for the alleged rape of Petitioner's daughter based on the facts then known to Officer Quiles. Both the United States magistrate judge and the United States district court judge agreed that there was, at the very least, arguable probable cause to arrest Petitioner. They both further found that there was no evidence to suggest that Officer Quiles concealed exculpatory information from the state court magistrate.

In turn, a three-judge panel of the Fifth Circuit unanimously upheld the district court's decision. The three-judge panel considered its decision to be so routine and mundane as not to merit publication.

Finally, as a result of Petitioner's filing of a petition for rehearing *en banc*, the remaining fourteen judges in regular active service had an opportunity to review this matter. Out of a total of seventeen Fifth Circuit judges, not a single one requested that the Fifth Circuit be polled on Petitioner's petition for rehearing *en banc*. The twenty judges who

have had the opportunity to review this case have been in unanimous agreement: this is a routine, mundane case in which an officer had, at the very least, arguable probable cause to present his request for an arrest warrant to a neutral, detached magistrate. This case does not present any issues worthy of this Court's review.

Remarkably, Petitioner tries to paint the Fifth Circuit as some sort of rogue court which has a long-established custom of ignoring this Court's precedents with respect to the application of qualified immunity. Petitioner's portrait of the Fifth Circuit is surreal. It is based on misrepresentations of the record, misrepresentations of the Fifth Circuit's opinion below, misrepresentations of previous Fifth Circuit opinions and misrepresentations of opinions from other federal courts.

Officer Quiles signed an affidavit in support of his application for an arrest warrant. The state magistrate reviewed the application, found probable cause to exist, and issued the arrest warrant. Petitioner's arrest was the end result of an investigation into rape allegations initially made by Petitioner's daughter to her mother in the course of the daughter's suicide attempt. Those allegations were repeated with more particularity to a nurse and a social worker during interviews. The daughter's allegations were first made to her mother at home, next made to a nurse at the hospital and finally repeated in a more particularized way (on videotape) to a trained social worker at the local children's

advocacy center. That trained social worker referred the matter to the police. Officer Quiles responded to the referral by reviewing the materials and documents and reviewing the videotaped interview. After that, Officer Quiles interviewed and took a written statement from the victim's mother, obtained a document allowing him to obtain the victim's medical records and obtained an affidavit from the nurse who heard one of the outcry statements. Armed with all of this information, Officer Quiles approached the state court magistrate to request an arrest warrant. After considering the evidence, the magistrate issued an arrest warrant for Petitioner.

Ignoring the evidence, Petitioner contends that Officer Quiles violated Petitioner's clearly established Fourth Amendment rights by applying for the arrest warrant. First, Petitioner contends that the restrictions applicable to anonymous informants should apply to victim eyewitnesses. More specifically, Petitioner contends that, as a matter of law, the testimony of a victim eyewitness cannot serve as a sufficient basis for probable cause to arrest without supporting evidence. However, the lower federal courts, like this Court, have recognized that the testimony of an eyewitness, particularly the victim of an alleged crime, is entitled to greater credence than informants.

Second, Petitioner contends that Officer Quiles should not have relied on the testimony of Petitioner's daughter because she may have had a motive to lie. The undisputed summary judgment evidence

established that, at the time, Officer Quiles was not aware of any evidence which called into question the credibility of Petitioner's daughter.

Third, perhaps recognizing that the summary judgment evidence demonstrates that Officer Quiles is entitled to summary judgment, Petitioner argues that courts should not consider the evidence when deciding qualified immunity – even if qualified immunity is asserted in a motion for summary judgment. Petitioner contends that when qualified immunity is asserted in the context of a motion for summary judgment, the court should look only to a plaintiff's allegations and not to the evidence. Respondent is not aware of any case in which any court has decided, in the context of a motion for summary judgment based on qualified immunity, to apply the standard proposed by Petitioner, namely, the standard applicable to motions to dismiss for failure to state a claim. There is simply no authority to support Petitioner's quixotic effort to exempt civil rights claims from the normal federal summary judgment practice.

Fourth, Petitioner attempts to create a conflict among the circuits in regard to qualified immunity by misrepresenting the Fifth Circuit's opinion. Petitioner falsely claims that the Fifth Circuit used a three-step sequence in deciding qualified immunity, rather than the two-step sequence adopted by this Court. While the Fifth Circuit mentioned that, in the past, it had sometimes used a three-step sequence for qualified immunity, it specifically noted in this case that it was

not following those earlier Fifth Circuit precedents and instead was adhering to this Court's more recent qualified immunity decisions.

The Fifth Circuit's decision, both on the Fourth Amendment and qualified immunity, is in line with the precedents of this Court and of the other federal courts of appeals. Petitioner cannot change the unremarkable nature of the Fifth Circuit's decision through his misrepresentations of the facts and lower court opinions. Moreover, the Fifth Circuit's decision has even less significance because it has no precedential effect and, even assuming it was reversed, Officer Quiles would still be entitled to summary judgment because a neutral magistrate issued the warrant. Officer Quiles disclosed to a magistrate all of the relevant evidence in Officer Quiles' knowledge at the time and the magistrate issued an arrest warrant.

The petition for writ of certiorari should be denied.

STATEMENT OF THE CASE

A. Background.

1. Quinn and his former wife, Laurie Houston, divorced in 1991. Quinn was awarded custody of their two children, but one of them, Quinn's daughter Katie, went to live with Houston at some point. On July 15, 2004, Katie, who was sixteen at the time,

told her mother that Quinn had been sexually abusing her since she was eight years old. Earlier that day, Katie had been arrested for shoplifting. While Katie and her mother were discussing Katie's arrest, Katie alleged that she had been abused by Quinn. This allegation was made in conjunction with Katie's attempted suicide. After that, Katie was taken to the hospital. *See* App. 5.

2. At the hospital, Nurse Joy Turner performed an admission assessment on Katie. During the assessment, Katie stated that Quinn had sexually abused her beginning when she was eight years old and ending when she was twelve. Nurse Turner reported the allegations of abuse to the Texas Department of Family and Protective Services, Child Protective Services Division (CPS). On July 21, 2004, Dawn Todd of the Denton County Children's Advocacy Center conducted a videotaped interview with Katie. In the interview, Katie stated that her father had engaged in sexual intercourse with her on two separate occasions, once when she was eight years old and once when she was nine or ten years old. *See* App. 5-6.

3. On July 30, 2004, Officer Quiles received a written notification of the alleged abuse from CPS (the CPS intake report) and a copy of the videotaped interview conducted by Todd. Quiles viewed the videotape of the interview on August 9, 2004. On August 12, Laurie Houston met with Quiles and provided Quiles with a written statement regarding the events of July 15, 2004, including Katie's claim

that Quinn had been sexually abusing her since she was eight years old. Houston also stated that Quinn was an alcoholic and a flight and suicide risk. *See* App. 6.

4. On the same date, Quiles asked Houston to provide him with a copy of Katie's medical records. On August 31, 2004, Beth Hudson, a registered nurse, performed a Sexual Assault Nurse Examiner (SANE) examination on Katie. *See* App. 6.

5. On September 2, 2004, Quiles received an affidavit from Joy Turner, the nurse who had performed the admission assessment on Katie at the hospital, recounting Katie's statements to her that her father had abused her from ages eight to twelve. *See* App. 6-7.

6. Based on the videotaped interview of Katie, Turner's affidavit, Houston's written and oral statements, and the CPS intake report, Quiles executed a probable cause affidavit on September 8, 2004, for Quinn's arrest. The next day, a warrant was issued for Quinn's arrest for the felony criminal offense of aggravated sexual assault of a child. Quinn was arrested by the McKinney Police Department on September 12, 2004. Quiles was not present at the arrest. Quiles was not aware of the results of the SANE examination until after Quinn's arrest. The examination revealed that Katie had a hymen tear, indicating some form of physical trauma. The report did not indicate the cause of the tear or when it had occurred. *See* App. 7.

7. After the criminal case against Quinn was dismissed, Quinn sued Officer Quiles and the City of McKinney ("the City") (jointly, "the City Defendants") under 42 U.S.C. § 1983 for allegedly violating Quinn's right to be free from unreasonable seizures under the Fourth Amendment.[1] *See* App. 3. The City Defendants filed a motion to dismiss all claims under Federal Rule of Civil Procedure 12(b)(6) and Officer Quiles also filed a motion for summary judgment. *Id.* The district court adopted the report and recommendation of the magistrate, dismissing all of Quinn's claims against the City and granting summary judgment to Officer Quiles. *See* App. 4. Quinn appealed to the Fifth Circuit on some of his claims and the court of appeals affirmed the decision of the district court. *See* App. 1. Quinn sought rehearing *en banc*, but none of the Fifth Circuit judges requested the case be considered for rehearing. *See* App. 45. Quinn now seeks review of the Fifth Circuit's decision which affirmed that Officer Quiles is entitled to qualified immunity from Quinn's Fourth Amendment claim. *See* Pet. Br. i.[2]

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[1] Quinn also brought claims against Officer Quiles and the City for alleged violations of his right to due process and equal protection under the Fifth and Fourteenth Amendments, for malicious prosecution under state and federal law, and for false arrest and imprisonment and various forms of negligence under state law. *See* App. 3. Quinn has not sought review on any of these other claims.

[2] Quinn also seeks review of certain claims against the Collin County district attorneys. *See* Pet. Br. i-ii. Quinn's claims

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B. Petitioner Misrepresents the Facts of the Case.

1. Petitioner misleadingly states, "It is undisputed that the only evidence the police had in their possession before applying for the arrest warrant was the uncorroborated outcry of Katie, made on the day she was arrested for shoplifting and while attempting suicide, eight years after the alleged assault supposedly occurred." Pet. Br. i. Petitioner's statement implies that the police relied solely on an allegation made in the midst of a suicide attempt. *See id.* at 4 ("whose outcry was made on the same day she was arrested for shoplifting and while she was so distraught"). This is false and misleading. Katie's statement during her suicide attempt was the first time she told her mother that Petitioner sexually assaulted her. *See* App. 5. That statement was followed up by consistent statements to independent interviewers, including Joy Turner, the nurse who performed an admission assessment on Katie on the day of the suicide attempt and Dawn Todd of the Denton County Children's Advocacy Center. *See* App. 5-6. Officer Quiles did not rely solely on the statements of Laurie Houston, or even the statements of Turner and Todd. Officer Quiles reviewed those

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relating to the alleged delay in prosecution do not relate to Officer Quiles or the City.

materials, but he also viewed the videotape of Todd's interview with Katie. *See* App. 6-7.[3]

2. Petitioner states, "the Fifth Circuit also incorrectly stated that Quinn did not produce any evidence of unconstitutional conduct. Actually, Quinn produced the *only* such evidence in the entire case: the affidavit of Melvin Tucker." Pet. Br. 11 n.5. Petitioner's statement is false and misleading. First, Melvin Tucker's affidavit was rejected for various reasons, including the fact that Tucker relied on evidence discovered after the arrest to explain why Tucker believed that there was no probable cause to arrest Quinn. *See* S. App. 23.[4] Second, the Fifth Circuit noted that Quinn failed to present evidence challenging Officer Quiles' assertion that he was unaware of the allegedly exculpatory evidence when he signed the probable cause affidavit. *See* App. 14 and 17; *see also* S. App. 23. As the Fifth Circuit explained, it was not objectively unreasonable "for Quiles to have believed that probable cause existed in light of the detailed nature of Katie's allegations and the fact that Quiles did not possess evidence at the

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[3] Katie has consistently maintained that Petitioner sexually assaulted her. No subsequent interviews have changed her testimony on the essential facts of her allegation of rape.

[4] The magistrate explained, "Tucker's affidavit, as noted by Defendants, assumes that Quiles knew facts that Quiles has stated, under oath, that he did not [know] at the time he submitted the affidavit for the warrant. Therefore, Tucker's affidavit has little effect on this analysis." S. App. 23.

time that Katie may have had a motive to fabricate the allegations." App. 13.

3. Petitioner states, "Defendant Quiles admitted that all he had to go on to suspect this crime had been committed was the uncorroborated story of an informant of unknown reliability, a story completely unsupported by any physical evidence." Pet. Br. 21. Petitioner's statement is misleading in two respects. First, it is misleading to refer to Katie as merely "an informant." In the terminology of the federal courts, Katie was a victim eyewitness. The courts, including this one, have recognized the difference between informants in general and eyewitnesses, especially the victim of a crime. Second, Petitioner emphasizes that Katie's story was unsupported by any physical evidence. That there might be no physical evidence is not surprising. The alleged rape occurred many years before and Katie had been sexually active since that time. *See* App. 16. Significantly, while Officer Quiles did not have physical evidence at the time he signed the probable cause affidavit, the medical report from the SANE examiner did lend support to Katie's allegations of sexual trauma. *See* App. 7; S. App. 23.

4. Petitioner states, "He also admitted that hearing a story (even three different versions of the same story) may be enough for reasonable suspicion and thus trigger an investigation, but it does not provide probable cause sufficient to support an arrest." Pet. Br. 21. Petitioner then states, in a footnote, "Somehow, Officer Quiles then decided that hearing

the same story a fourth time pushed him from reasonable suspicion to probable cause. . . . Even the Fifth Circuit was critical of Quiles on this point." *Id.* at 21 n.12. Petitioner's statements are false and misleading. First, Officer Quiles did not state that hearing a story (*e.g.*, of an eyewitness or victim eyewitness) cannot provide probable cause to support an arrest. The deposition pages cited by Petitioner and included in Petitioner's appendix do not support Petitioner's claim. Second, Officer Quiles did not state that merely "hearing the story a fourth time" created probable cause. Officer Quiles explained that he had reasonable suspicion after he had reviewed the written statements from the individuals who interviewed Katie, but that he had probable cause when he reviewed Katie's statement on the videotaped interview. *See* App. 55-64. Third, the Fifth Circuit did not criticize Officer Quiles for believing there was probable cause. The Fifth Circuit did note that it would have been better if Officer Quiles could have found some way to personally interview Quinn and Katie, but the court was careful to note "we do not believe that it was objectively unreasonable to believe that probable cause existed without interviewing Quiles and Houston [sic]." App. 15 n.4.

REASONS FOR DENYING THE WRIT

I. THE PETITION DOES NOT PRESENT AN IMPORTANT LEGAL ISSUE ON WHICH THERE IS CONFLICTING AUTHORITY.

A. The Courts Uniformly Agree that the Testimony of Victim Eyewitnesses Is Generally Sufficient to Establish Probable Cause to Arrest.

Petitioner proposes the novel theory that the testimony of an alleged rape victim, a victim eyewitness, is insufficient to establish probable cause for an arrest of the alleged rapist. In Petitioner's world, crimes that have only two eyewitnesses – the perpetrator and the victim – would frequently be impossible to investigate and prosecute. Petitioner proposes that, as a matter of law, the testimony of a victim eyewitness, such as a victim of rape, cannot, on its own, suffice to establish probable cause. Petitioner's proposed interpretation of the Fourth Amendment is contrary to the long-standing precedents of the federal courts throughout the United States and would leave many victims of sexual assault without recourse or protection.

The general rule in courts throughout the United States is that the testimony from the alleged victim of a crime is ordinarily sufficient to establish probable cause. *See, e.g., Acosta v. Ames Dep't Stores, Inc.*, 386 F.3d 5, 10 (1st Cir. 2004) ("The uncorroborated testimony of a victim or other percipient witness, standing alone, ordinarily can support a finding of

probable cause."); *Sharrar v. Felsing*, 128 F.3d 810, 818 (3d Cir. 1997) ("When a police officer has received a reliable identification by a victim of his or her attacker, the police have probable cause to arrest."); *United States v. Shaw*, 464 F.3d 615, 623 (6th Cir. 2006) ("An eye witness's statement that he or she saw a crime committed or was the victim of a crime is generally sufficient to establish probable cause."); *Reynolds v. Jamison*, 488 F.3d 756, 765 (7th Cir. 2007) ("We have repeatedly held that a complaint of the putative victim or single witness is generally sufficient to establish probable cause, unless the officer has a reason to question the witness' account."); *Clay v. Conlee*, 815 F.2d 1164, 1168 (8th Cir. 1987) ("Clearly, law enforcement officers are entitled to rely on information supplied by the victim of a crime, absent some indication that the information is not reasonably trustworthy or reliable.").[5] As this Court has pointed out,

> [E]ven if we entertain some doubt as to an informant's motives, his explicit and detailed

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[5] *See also Schramm v. State*, 648 S.E.2d 392, 395 (Ga. Ct. App. 2007) ("testimony of a single witness is sufficient to establish a fact"); *Glover v. State*, 102 S.W.3d 754, 759 (Tex. App. – Texarkana 2002, pet. ref'd) ("One witness providing circumstantial evidence of each element satisfies the State's burden with respect to legal sufficiency."); *Messenger v. State*, 2008 Tex. App. LEXIS 4357, 7 (Tex. App. – Fort Worth 2008, no pet.) ("despite the lack of physical evidence, M.H. provided sufficient testimony, [by stating that the assailant had intercourse with her without her consent,] to show that a sexual assault had occurred.").

> description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles his tip to greater weight than might otherwise be the case.

Illinois v. Gates, 462 U.S. 213, 234 (1983).

Quinn, however, attempts to confuse the issue by arguing that the testimony of victims of sexual assault should be subject to the higher level of scrutiny sometimes applied to unknown informants. *See, e.g., Easton v. City of Boulder*, 776 F.2d 1441, 1449 (10th Cir. 1985) ("the skepticism and careful scrutiny usually found in cases involving informants, sometimes anonymous, from the criminal milieu, is appropriately relaxed if the informant is an identified victim or ordinary citizen witness."); *Caldarola v. Calabrese*, 298 F.3d 156, 165 (2d Cir. 2002). In support of his new restriction on the ability of police officers to investigate sexual assaults, Quinn cites two cases: *Hale v. Fish*, 899 F.2d 390 (5th Cir. 1990), and *Ripson v. Alles*, 21 F.3d 805 (8th Cir. 1994). Quinn's reliance on *Hale* and *Ripson* highlights why there is no issue in this case worth reviewing.

First, *Hale* is a published Fifth Circuit case, whereas the decision in the case at bar is an unpublished Fifth Circuit case. Even assuming, *arguendo*, that *Hale* and the Fifth Circuit's decision in this case conflict, this Court should wait for the Fifth Circuit to resolve the conflict among its own precedents. Restraint makes even more sense in the context of this case since the decision in the case at bar is an

unpublished opinion that has no precedential authority within the Fifth Circuit. *See* 5TH CIR. R. 47.5.4 (unpublished opinions are not precedent). Petitioner contends that *Hale* represents the correct statement of the law. The Fifth Circuit's decision in the case at bar, even assuming it contradicts *Hale*, does not change that *Hale*, and not the decision in this case, is binding precedent within the Fifth Circuit.

Second, *Hale* does not conflict with the Fifth Circuit's decision in the case at bar. *Hale* was an unusual case, involving an extensive investigation into allegations that individuals acting on behalf of the Federal Bureau of Investigation (FBI) had kidnapped a parolee on the pretense of seeking his assistance for an on-going FBI investigation of alleged corruption in the Bossier County District Attorney's Office. *See* 899 F.2d at 392-98. The local sheriff's office sought and received a warrant for the arrest of the alleged kidnappers based on "false and misleading statements, as well as material omissions relevant to the probable cause determination." *Id.* at 398. In essence, the testifying officers had conducted an extensive investigation into the kidnapping allegation by the parolee and had found no evidence to support the claim and a considerable amount of evidence calling into doubt the parolee's story. *Id.* at 399-400. The Court noted that the parolee "had ample motive to lie [because he] was being prosecuted by the Bossier County District Attorney's Office, the subject of the alleged kidnappers' investigation." *Id.* at 399. In light of the overwhelming evidence available to the

arresting officers undercutting the reliability of the parolee's testimony, his statement was "lacking in the usual reliability given victim eyewitnesses." *Id.*; *see also id.* (it is "generally true" that no evidence of veracity is necessary to establish probable cause if the witness is a "victim eyewitness").

Hale, like the decision in the case at bar, and in accord with precedent throughout the United States, held that the testimony of a victim eyewitness is generally sufficient to establish probable cause for an arrest. *Hale*, 899 F.2d at 399; App. 13-14. While the testimony of a victim eyewitness is not sufficient when "the witness has a motivation to lie, or there is some other indication that the information is not reliable," *Hale*, 899 F.2d at 399, the general rule is that the testimony of victim eyewitnesses can support probable cause. The undisputed summary judgment evidence in the case at bar is that, at the time he signed the probable cause affidavit, Officer Quiles did not know of any evidence suggesting that Katie might have had a motive to lie about the alleged rape. *See* App. 14.

Finally, *Ripson* is distinguishable from the case at bar in three important respects. First, *Ripson* did not involve the testimony of a victim eyewitness. The testimony in *Ripson* was from Melody, Ripson's estranged wife, and from Melody's live-in boyfriend. They were the non-victim, non-eyewitnesses who reported to the police their belief that Ripson had sexually abused his two-year-old daughter. *See* 21 F.3d at 806.

Second, in *Ripson*, the officer knew that Mr. Ripson and his estranged wife, Melody, were involved in a custody dispute over their daughter. *Id.* at 808. In the case at bar, Officer Quiles had no such similar knowledge which would call into question the credibility of Petitioner's daughter. Officer Quiles had no prior knowledge of any allegedly bitter divorce or custody battle between Petitioner and Houston.

Third, in *Ripson*, the County Attorney had advised the officer to "keep investigating." The County Attorney in *Ripson* was surprised to learn that Mr. Ripson had been arrested by the officers a mere 12 hours after the County Attorney had told the officers to "keep investigating." *Id.* at 807. No such similar circumstance exists in the case at bar.

Assistant Police Chief Alles arrested Ripson based on the testimony of Melody and her live-in boyfriend, despite the lack of medical evidence and despite his knowledge that Melody and Ripson were currently engaged in a custody dispute. *Id.* at 808. In summary, *Ripson* did not involve the testimony of any victim eyewitnesses and the arresting officer in *Ripson* had reason to doubt the veracity of Melody's and her live-in boyfriend's testimony due to the custody dispute. In contrast, this case involves the testimony of a victim eyewitness, Petitioner's daughter, who repeatedly provided detailed statements about how Petitioner had raped her on two occasions. Moreover, while Petitioner alleges that there was an ongoing child support dispute that calls into question his daughter's veracity, it is undisputed that Officer

Quiles was unaware of the child support dispute until after the arrest. *See* App. 14.

B. There Is No Important Issue in this Case: Petitioner Simply Failed to Set Forth Evidence in Response to Officer Quiles' Motion for Summary Judgment.

1. Petitioner Misguidedly Contends that a Civil Rights Plaintiff Is Not Required to Provide Evidence in Response to a Motion for Summary Judgment Based on Qualified Immunity.

Petitioner's argument, at its core, is that he should not have been required to provide evidence in response to Officer Quiles' motion for summary judgment based on qualified immunity. Petitioner contends that the lower courts should have assumed the facts as alleged in Petitioner's complaint. *See* Pet. Br. 9 and n.3.[6] Petitioner's argument is without merit and without precedent.

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[6] Petitioner describes the first prong of the qualified immunity analysis as whether "the plaintiff's complaint properly allege[s] violation of a Constitutional right." Pet. Br. 9. Petitioner further explains that "[t]his is the same question addressed in a motion to dismiss under FRCP 12(b)(6)." Pet. Br. 9 n.3; *see also* Pet. Br. 2 ("The first question is similar to the standard under FRCP 12(b)(6) and asks whether the plaintiff has pleaded sufficiently to support a cause of action for violation

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Public officials are entitled to assert qualified immunity under *both* Federal Rule of Civil Procedure 12 in a motion to dismiss *and* Rule 56 in a motion for summary judgment. *See Behrens v. Pelletier*, 516 U.S. 299, 306-08 (1996); *see also Pearson v. Callahan*, ___ U.S. ___, 129 S. Ct. 808, 815-16 (2009).

> Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery. Even if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts.

Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).[7]

In order to overcome the assertion of qualified immunity in a motion to dismiss, the facts that a civil

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of his constitutional rights."); *id.* at 13 ("The proper inquiry for qualified immunity only asks whether the state of the law is such that an officer of reasonable competence would know that what the plaintiff *has accused* the defendant of doing is unconstitutional."); *id.* at 15 ("whether the plaintiff has fulfilled prong 1 by *pleading* facts supporting a viable cause of action").

[7] This Court recently noted in *Pearson* that the first prong of qualified immunity analysis is "whether the facts that a plaintiff has alleged (see Fed. Rules Civ. Proc. 12(b)(6), (c)) or shown (see Rules 50, 56) make out a violation of a constitutional right." 129 S. Ct. 815-16.

rights plaintiff has alleged must make out a violation of a constitutional right. *Pearson*, 129 S. Ct. at 815-16; *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937, 1949 and 1953-54 (2009) (applying normal Rule 12(b)(6) standard to motions to dismiss based on qualified immunity). In order to overcome the assertion of qualified immunity in a motion for summary judgment, the facts that a civil rights plaintiff has shown must make out a violation of a constitutional right. *Pearson*, 129 S. Ct. at 815-16. As this Court explained in *Behrens*, "On summary judgment, however, the plaintiff can no longer rest on the pleadings, see Fed. Rule Civil Proc. 56, and the court looks to the evidence before it (in the light most favorable to the plaintiff) when conducting the *Harlow* [*v. Fitzgerald*, 457 U.S. 800 (1982)] inquiry." 516 U.S. at 309.

Petitioner, however, proposes that the Fifth Circuit is a rogue court of appeals because it expected Petitioner to provide evidence in response to Officer Quiles' motion for summary judgment. *See* Pet. Br. 2, 9 and 13; *see also* App. 17 ("Quinn has failed to present any competent summary judgment evidence that Quiles withheld relevant evidence from the magistrate judge."); *id.* at 14 ("there is no evidence");[8] *id.* at 16 ("there is no evidence").

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[8] The Fifth Circuit writes, "Katie's vested interest in the child support dispute between Quinn and Laurie Houston raises a more serious question about her reliability, but there is no evidence that Quiles was aware of the dispute at the time of the

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Officer Quiles moved for summary judgment based on qualified immunity. *See* App. 3 In response, Petitioner was required to "set out specific facts showing a genuine issue for trial." FED. R. CIV. P. 56(e)(2). Petitioner's lack of evidence or failure to provide that evidence to the district court is not a basis for requesting that this Court review the Fifth Circuit's decision. There is no new, novel or conflicting issue in this case. A plaintiff responding to a motion for summary judgment must fulfill his obligation to respond under Rule 56. That obligation to respond exists even if the plaintiff alleges civil rights violations and even if the defendant asserts qualified immunity. Petitioner failed to provide competent summary judgment evidence on the question of whether Officer Quiles knew about any of the alleged exculpatory evidence when he signed the probable cause affidavit. Petitioner failed to show that there was a fact question for the jury and, as a result, the district court and Fifth Circuit held that Officer Quiles was entitled to summary judgment.

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arrest. There is no evidence that Quinn [sic] disregarded any exculpatory evidence at the time of the arrest." App. 14. While the second sentence quoted refers to Petitioner Quinn, it is clear from the context that the Fifth Circuit intended to state that there is no evidence that Officer Quiles disregarded any exculpatory evidence at the time of the arrest.

2. Petitioner Attempts to Limit the Qualified Immunity Defense to the Pleadings and Prohibit the Use of the Defense Based on the Facts.

Petitioner erroneously claims that the qualified immunity defense is limited to analysis of the pleadings and is not available as a defense based on the evidence developed during discovery or at trial. Petitioner states,

> [T]he proper legal inquiry for qualified immunity purposes does not consider whether the defendant's conduct was or was not factually or "objectively" reasonable. The *proper* inquiry for qualified immunity only asks whether the state of the law is such that an officer of reasonable competence would know that what the plaintiff has accused the defendant of doing is unconstitutional.

Pet. Br. 13 (emphasis in original).

Petitioner's novel interpretation of qualified immunity conflicts with this Court's precedents in *Mitchell*, *Behrens*, and *Pearson*. As shown above, this Court has consistently held that a civil rights plaintiff, like any other plaintiff, is required to provide evidence that creates a fact question in order to overcome a motion for summary judgment and proceed to trial. At the summary judgment stage, the plaintiff can no longer rest on the pleadings. *Behrens*, 516 U.S. at 309.

While Quinn's petition for writ of certiorari is muddled in its arguments, it appears that Petitioner may be confusing reasonableness under the Fourth Amendment with reasonableness under qualified immunity. Quinn would not be the first to make this mistake. *See Saucier v. Katz*, 533 U.S. 194, 197 (2001) (holding that Ninth Circuit erroneously combined Fourth Amendment reasonableness with qualified immunity reasonableness). However, Quinn's mistake was resolved by this Court in *Saucier* and *Brosseau v. Haugen*, 543 U.S. 194 (2004), when this Court held that whether a police officer acted reasonably in light of clearly established law is a separate inquiry from whether the officer's use of force was reasonable under the circumstances. Even assuming the officer's use of force was unreasonable, the officer can still be entitled to qualified immunity if he could have reasonably believed that his use of force was reasonable in light of clearly established law. *Saucier*, 533 U.S. at 202; *Brosseau*, 543 U.S. at 198-99.

As in *Saucier* and *Brosseau*, there are two reasonableness inquiries in this case: (1) whether the facts and circumstances known to the officer could justify a reasonably prudent police officer to believe that the suspect committed an offense, *see Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979); and (2) whether the officer's conduct was objectively reasonable in light of the legal rules that were clearly established at the time it was taken. *Pearson*, 129 S. Ct. at 822. As this Court explained in *Saucier*, the general Fourth Amendment requirement of reasonableness

does not clearly establish that all actions that are unreasonable under the Fourth Amendment are clearly established for purposes of qualified immunity. 533 U.S. at 201-02; *see also Brosseau*, 543 U.S. at 198-99.

The Fifth Circuit followed the direction of this Court and considered Fourth Amendment reasonableness and qualified immunity reasonableness as separate inquiries. The Fifth Circuit chose not to decide the Fourth Amendment reasonableness issue because the qualified immunity reasonableness issue was fairly straightforward. *Cf. Pearson*, 129 S. Ct. at 820 (providing reasons for deciding qualified immunity on the clearly established prong without deciding whether there was a constitutional violation). The testimony of victim eyewitnesses is generally sufficient to establish probable cause and there was no evidence that Officer Quiles had evidence calling into serious question Katie's allegations against Quinn. While Petitioner is confused about qualified immunity, the courts of appeals are not. There is no issue worthy of review in Petitioner's clai ns against Officer Quiles.

C. Petitioner Misrepresents the Fifth Circuit's Application of Qualified Immunity in a Vain Attempt to Create the Illusion of a Conflict with Prior Precedent.

Petitioner misrepresents the Fifth Circuit's qualified immunity analysis and twists statements out of

context in a vain attempt to create the illusion of a conflict between the Fifth Circuit's decision and other precedents. Petitioner alleges that the Fifth Circuit "failed to follow this Court's settled rules related to qualified immunity." Pet. Br. 5. Petitioner claims that the ruling below "is in direct conflict with every qualified immunity decision ever made by this Court and with the decisions of every other circuit court of appeals that has addressed the same issues." *Id.* Moreover, Petitioner states that this Court's "recent efforts to clarify the qualified immunity decision-making process have seemingly fallen on deaf ears in the Fifth Circuit." Pet. Br. 10. The Fifth Circuit supposedly "completely ignores the proper methodology found in this Court's case law." *Id.* The principal flaw in Petitioner's allegations, however, is that they are false. What Petitioner lacks in accuracy and honesty, he attempts to make up with bravado and strong rhetoric. Petitioner fails to accurately describe this Court's qualified immunity precedents, as well as the Fifth Circuit's decision in the case at bar. Petitioner's description of qualified immunity analysis is not grounded in this Court's precedent. But regardless, Petitioner's description of the Fifth Circuit's decision is so inaccurate and misleading as to make it particularly difficult to determine what aspect of the actual opinion Petitioner wants this Court to review.

1. Even a Cursory Glance at the Fifth Circuit's Qualified Immunity Analysis Demonstrates that it Relies on this Court's Recent Precedents.

Petitioner claims that the Fifth Circuit, "as a matter of practice, completely ignores the proper methodology found in this Court's case law" regarding qualified immunity. Pet. Br. 10. A quick comparison, however, of the qualified immunity standard as enunciated by the Fifth Circuit in this case compared with this Court's recent decision in *Pearson* helps to illustrate Petitioner's quixotic approach to qualified immunity. In *Pearson*, this Court explained,

> In *Saucier*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272, this Court mandated a two-step sequence for resolving government officials' qualified immunity claims. First, a court must decide whether the facts that a plaintiff has alleged (see Fed. Rules Civ. Proc. 12(b)(6), (c)) or shown (see Rules 50, 56) make out a violation of a constitutional right. 533 U.S., at 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272. Second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was "clearly established" at the time of defendant's alleged misconduct. *Ibid.* Qualified immunity is applicable unless the official's conduct violated a clearly established constitutional right. *Anderson* [*v. Creighton*, 483 U.S. 635, 640 (1987)].

Id. at 815-16.

In this case, the Fifth Circuit described the same two-step sequence as follows:

> In *Saucier v. Katz*, 533 U.S. 194 (2001), the Supreme Court mandated a two-step sequence for resolving government officials' qualified immunity claims: first, a court must decide whether the facts alleged or shown are sufficient to make out a violation of a constitutional right; second, the court must decide whether the right at issue was "clearly established" at the time of the defendant's alleged misconduct. If the official's conduct violated a clearly established right, then qualified immunity is not applicable.

App. 8-9.

While the Fifth Circuit's enunciation of qualified immunity in this case is drawn almost verbatim from this Court's recent opinion in *Pearson*, Petitioner proposes that the two-step sequence should be described as follows:

Prong 1. Does the plaintiff's complaint properly allege violation of a Constitutional right?

Prong 2. Was the law, at the time of the official's conduct, clearly established enough to give the defendant "fair warning" that the conduct he is accused of taking violated Plaintiff's Constitutional rights?

Pet. Br. 9 (citing *Saucier*, 533 U.S. at 201-03; *Hope v. Pelzer*, 536 U.S. 730, 739-40 (2002)). Petitioner's two-step sequence is not the standard enunciated by this Court. While Petitioner claims that this Court's "recent efforts to clarify the qualified immunity decision-making process have seemingly fallen on deaf ears in the Fifth Circuit," it is the Fifth Circuit's description of the two-step sequence that conforms to this Court's 2009 decision in *Pearson*.

2. The Fifth Circuit Specifically Rejected the Alleged Error Petitioner Claims Is Readily Apparent in the Fifth Circuit's Decision.

Petitioner falsely alleges that the Fifth Circuit erred by using a "unique and erroneous methodology" involving two sub-parts in the second (clearly established) prong of the qualified immunity analysis. *See* Pet. Br. 10. In support of Petitioner's misleading claim, Petitioner selectively quotes from the following *footnote* in the Fifth Circuit's decision:

> This circuit has at times characterized its approach in qualified immunity cases as a three-pronged inquiry in which the traditional second prong is divided into two separate and distinct inquiries: whether the right was clearly established and whether the officer's conduct was objectively reasonable. *The Supreme Court's recent case law makes it clear that these inquiries are more appropriately viewed not as separate and*

> *distinct, but as two sides of the same analytical coin.*

App. 10 n.2 (citations removed).[9] Petitioner leaves out the last sentence of the quote; the sentence in which the Fifth Circuit panel indicates that it is modifying its approach to qualified immunity in order to *avoid* dividing the second prong into sub-parts. Petitioner, however, proposes that it is "readily apparent" that the Fifth Circuit erred by dividing the second prong into two sub-parts. *See* Pet. Br. 10. Once again, it is clear that it is the Fifth Circuit that is working to conform its analysis to that of this Court while Petitioner is tilting at windmills.

II. THE OUTCOME OF THIS APPEAL HAS NO PRECEDENTIAL EFFECT AND WOULD NOT AFFECT THE OUTCOME OF THIS LITIGATION.

A. The Fifth Circuit's Decision is Unpublished and has No Precedential Effect.

Petitioner claims that the Fifth Circuit's decision "confuses the law [and] leaves future courts with a decision they could 'follow' potentially leading to even

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[9] This Court recently explained that the second or clearly established prong "turns on the 'objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken.'" *Pearson*, 129 S. Ct. at 822 (quoting *Wilson v. Layne*, 526 U.S. 603, 614 (1999)).

more erroneous decisions on this important Constitutional issue." Pet. Br. 6. As shown already, it is Petitioner who has confused the law, not the Fifth Circuit. However, even assuming the Fifth Circuit had confused the law, this case would not be a good decision from which to clarify the law of qualified immunity.

First, much of the Fifth Circuit's decision turns on the fact that Petitioner failed to present summary judgment evidence sufficient to establish a fact question as to whether Officer Quiles knew of the allegedly exculpatory facts when he signed the probable cause affidavit. As a result, the decision is fact-bound and unlikely to have an effect on later decisions.

Second, the decision is unpublished. *See* App. 2 n.*. In the Fifth Circuit, unpublished decisions "are not precedent, except under the doctrine of *res judicata*, *collateral estoppel*, or law of the case." 5TH CIR. R. 47.5.4. The only parties that the Fifth Circuit's decision is going affect are the parties to the decision – Petitioner and the various respondents. There is no reason to review this case.

B. Reversal of the Fifth Circuit's Decision Would Not Affect the Outcome of the Case Because a Neutral Magistrate Issued the Arrest Warrant.

Petitioner would not benefit from reversal of the Fifth Circuit's decision because Officer Quiles' probable cause affidavit was reviewed by a neutral and

detached magistrate and the magistrate issued the arrest warrant. *Cf. Gates*, 462 U.S. at 236-37.[10] Even assuming this Court reversed the decision of the Fifth Circuit, Officer Quiles would still be entitled to summary judgment because the warrant issued by the magistrate constitutes an independent justification for the arrest that cuts off any liability on the part of Officer Quiles unless he concealed evidence. *See Malley v. Briggs*, 475 U.S. 335, 344-45 (1986) ("Only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable, will the shield of immunity be lost."); *see also* App. 7. As the Fifth Circuit explained, and Quinn has not challenged in his petition, "Quinn has failed to present any competent summary judgment evidence that Quiles withheld relevant evidence from the magistrate judge." App. 17. Quinn argued on appeal before the Fifth Circuit that the court of appeals should reverse the decision of the district court because Officer Quiles allegedly violated the Fifth and Fourteenth Amendments by engaging in judicial deception when applying for the warrant. *See* App. 11. The Fifth Circuit affirmed the decision of the district court entering summary

[10] *See also Massachusetts v. Sheppard*, 468 U.S. 981, 990 (1984) (officer entitled to rely on warrant); *Groh v. Ramirez*, 540 U.S. 551, 564 (2004) (officer not entitled to rely on warrant because defect is apparent on face of warrant).

judgment on Quinn's Fifth and Fourteenth Amendment claims. *See* App. 17. Quinn has not sought review of that portion of the Fifth Circuit's decision. Since the Fifth Circuit affirmed the holding that Quiles did not withhold relevant evidence from the magistrate judge, the warrant issued by the magistrate forecloses Petitioner's Fourth Amendment claim against Officer Quiles. This case does not raise any important issues as to Fourth Amendment jurisprudence, qualified immunity jurisprudence or even the merits of this litigation.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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